IN THE

Supreme Court of the United States

OCTOBER TERM, 1976:

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC.,
Petitioner,

vs.

INDIANA STATE BOARD OF HEALTH; STATE OF INDIANA; CASPER W. WEINBERGER; SECRETARY OF HEALTH, EDUCATION AND WELFARE; PARK-VIEW MEMORIAL HOSPITAL, INC.; THE LUTHERAN HOSPITAL, INC.; ST. JOSEPH'S HOSPITAL OF FORT WAYNE, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Lakeside Mercy Hospital, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, is reported at 421 F. Supp. 193 and appears in the appendix hereto. The

order of the Court of Appeals for the Seventh Circuit adopting the opinion of the District Judge is unpublished and appears in the appendix hereto.

JURISDICTION.

The order of the Court of Appeals of the Seventh Circuit was entered on December 30, 1976. A timely Petition for Rehearing and Suggestion for Rehearing in Banc was denied on January 27, 1977. A copy of the order appears in the appendix hereto. This Petition for Certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

I. Whether in a program of cooperative federalism a state court has the subject matter jurisdiction to restrain a federal agency from complying with its federal regulations because the state court believes the federal law should be enforced[1] in a different manner from that expressed in the federal regulations.

II. Whether in a program of cooperative federalism a state's agreement "to conform to federal requirements" binds its judicial as well as its legislative branch.

III. Whether a federal right to agency review within time limits set by federal law under a program of cooperative federalism is a right within the ambit of rights and interests pro-

1. The selection of the word "enforce" for this issue was made by the court below:

> "Plaintiff contends that to allow a state court to interfere with the federally mandated timetable in this case would serve as precedent for allowing state courts to enjoin any federal agency proceeding. The crux of the matter is subject jurisdiction. Except where Congress places exclusive federal jurisdiction in the federal courts, there is no objection where a state court with jurisdiction over the parties enforces federal law." 421 F. Supp. at 202 (footnote 9), Petitioner's Appendix at 13.

The "federal law" which the state court "enforced" has never been identified and remains a mystery to this day.

tected by the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTION, STATUTE AND REGULATIONS.

Article VI, Clause 2 of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V of the Constitution provides:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

Amendment XIV, Section 1 of the Constitution provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Portions of § 1122 of the Social Security Act, 42 USC § 1320a-1(d)(1)(A)(B)(i) are as follows:

> "(d)(1) Except as provided in paragraph (2), if the Secretary determines that—
>
> (A) neither the planning agency designated in the agreement described in subsection (b) of this section nor an agency described in clause (ii) of subparagraph (B) of this paragraph had been given notice of any proposed capital expenditure (in accordance with such procedure or in such detail as may be required by such agency) at least 60 days prior to obligation for such expenditure; or (B)(i) the planning agency so designated or an agency so described had received such timely notice of the intention to make such capital expenditure and had, within a reasonable period after receiving such notice and prior

> to obligation for such expenditure, notified the person proposing such expenditure that the expenditure would not be in conformity with the standards, criteria, or plans developed by such agency or any other agency described in clause (ii) for adequate health care facilities in such State or in the area for which such other agency has responsibility, and"

Regulation 42 C. F. R. § 100.106 is lengthy and is set forth in the appendix hereto.

STATEMENT OF THE CASE.

This petition involves a controversy arising out of a program of cooperative federalism established by § 1122 of the Social Security Act (42 USC § 1320a-1) and its regulations. This program is designed to upgrade health care facilities throughout the nation by reimbursing through the repayment provisions of Medicare/Medicaid those persons who are about to make capital expenditures in an effort to create or expand health care facilities. Under this program, federal funds are provided to participating states for administration. States are not compelled to join this program. However, if a state decides to join the program in order to obtain federal funding, the provisions of § 1122 of the Social Security Act (42 USC § 1320a-1) and its regulations become binding on that state.

One of the provisions of the Social Security Act (42 USC § 1320a-1) which becomes binding on each participating state is the provision that each state shall designate an agency which shall be responsible for the administration of this program in that state. This agency then becomes known as the Designated Planning Agency of the United States Secretary of Health, Education and Welfare for that particular state. The role of the Designated Planning Agency ("DPA") is to review various applications for capital expenditure reimbursement submitted under this federal-state program and to decide which applicants should receive capital expenditure reimbursement from the federal government.

When each state designates a planning agency for the Secretary of Health, Education and Welfare ("the Secretary"), it agrees that this agency will "conform to federal requirements" expressed in the Social Security Act (42 USC § 1320a-1) and its regulations when reviewing the applications for capital expenditure reimbursement. Under 42 USC § 1320a-1, the "DPA" must review each application within a reasonable time after its submission. The regulations under 42 USC § 1320a-1 define this reasonable time for review by prescribing that the "DPA" must review each application within 60 days after its submission. Under the Act and Regulations, failure by the "DPA" to give notice of rejection of an application within the 60 days constitutes automatic approval of the application. Thus, each applicant is granted by the Regulations his own "time clock" consisting of 60 days. The Regulations state expressly that the only time when the "DPA" need not review an application within 60 days after its submission is when the applicant agrees to the delay in his review. Consequently, the Regulations prescribe that an applicant's "time clock" can only be tolled with the applicant's approval.

In the case at bar, Lakeside Mercy Hospital, Inc. ("Lakeside") was one of five applicants in Fort Wayne, Indiana, all of which were competing for the same capital expenditure reimbursement under 42 USC § 1320a-1 and its regulations. The State of Indiana had agreed to appoint the Indiana State Board of Health ("ISBH") as the Secretary's "DPA" for Indiana. Therefore, all five hospitals had submitted applications at different times to "ISBH" for its consideration.

In point of time the first application filed had been that of Community Hospital. In conformity with federal policy ISBH first conducted a review of the Community Hospital application, although other hospitals, including Lakeside, had applications pending during that review period. The Community Hospital application was rejected. Lakeside's application was next in point of time. Lakeside's 60 day review period of its application was to end in December, 1974.

Meanwhile, Community Hospital had filed an action in an Indiana state court seeking judicial review of ISBH's rejection of its application. It is this action by Community Hospital which is variously referred to in this petition as the state court action or lawsuit. Lakeside was not a party, nor was the Secretary a party. The parties were ISBH and the other competing hospitals.

On December 9, 1974, Lakeside had 15 days remaining on its "time clock" when the Indiana state court in the Community Hospital lawsuit, to which Lakeside was not a party, enjoined and restrained ISBH from acting upon all applications, including Lakeside's. The December restraint upon ISBH which continued until May 27, 1975, was not a judicial determination by the state court but was "entered with the consent of the parties." 421 F. Supp. at 203 (Petitioner's Appendix at 14-15). The "parties" to the consent decree were ISBH and the other hospitals which had competing applications with Lakeside.

Thereafter on May 27, 1975, in the above-described lawsuit, the state court determined that it had no subject matter jurisdiction to review the action of ISBH since it was "acting as an agency of the federal government." 421 F. Supp. at 197. (Petitioner's Appendix at 6.) The state court thereupon dismissed the Community Hospital complaint. The existing injunction was dissolved as to the competing hospitals. Notwithstanding, the state court issued a permanent injunction further prohibiting ISBH from acting specifically upon Lakeside's application.

Additionally, at that time, in contravention of federal policy that Lakeside was entitled to have its application processed on an individual basis in the order in which it had been filed, the state court ordered ISBH simultaneously to review the applications of the three competing hospitals with that of Lakeside's. The injunction against them having been dissolved but continued as to Lakeside, the three hospitals with the "encouragement" of ISBH (421 F. Supp. at 206-207. Petitioner's Appendix at 22) amended their previous individual applications and submitted a joint application. Thus, by the time the state court

permitted Lakeside to enter the starting gates, the rules had been substantially changed by the state court to the detriment of Lakeside.

Lakeside did not receive a review of its application or notice of rejection within the period of time required by the federal Act and Regulations. Failure of notification of rejection constituted automatic approval of Lakeside's application.

Therefore, in June, 1975, Lakeside filed its complaint in the District Court for deprivation of Civil Rights and for declaratory relief, alleging jurisdiction under §§ 1343(3) and (4), 1361, 1331, 28 USC, and charging that it had been deprived of its federal right for a prompt review. The District Court found that ISBH was an agency of the federal government (421 F. Supp. at 197, Petitioner's Appendix at 4), but contrary to the state court's own determination, the District Court decided that the state court had subject matter jurisdiction to enjoin the federal agency, ISBH, from complying with the federal law and regulations governing ISBH's activities as the Secretary's "DPA" (421 F. Supp. at 202 (Footnote 9), Petitioner's Appendix at 13), and granted a summary judgment against Lakeside.

By consent decrees in December, 1974, and judicial action in May, 1975, the state court created "inconsistency with such federal terms and conditions," namely: the running of Lakeside's federal "clock" was tolled by state court action from December 9, 1974, until June 30, 1975. The court below approved. (421 F. Supp. at 205, Petitioner's Appendix at 20.)

REASONS FOR GRANTING THE WRIT.

I.

This Petition should be granted by this Court because this case presents significant questions which this Court must inevitably decide. The importance of these questions stems from the fact that they arise out of a federal-state cooperative program.

"Schemes of Cooperative Federalism" is the generic term used to describe the multifarious federal-state programs which Congress has established to institute various important social-welfare policies. These schemes of cooperative federalism have been developed by Congress in this nation's recent past in an effort to promote a more efficient administration of federal funds to local areas while preserving and pursuing certain national social-welfare policies. Congress's novel attempt has met with much success and has resulted in a proliferation of these federal-state programs.[2]

The idea of cooperative federalism is a significant departure from the traditional American political idea that federalism meant a superior government with an inferior governmental enclave each separate and distinct running together in their own spheres with minimal contact and conflict. Cooperative federalism, on the other hand, introduces maximum contact between the two systems. The obvious result is a federal system of ever-increasing complexity and conflict.

Under the traditional political idea of federalism, a great body of law was developed by this Court in order to draw the power lines between the two systems. This case presents the overall question of whether this great body of law developed by this Court still has applicability to the novel idea of federalism represented by cooperative federalism. This greater question is but a composition of subsidiary questions all of which present a different aspect of this fundamental problem of the balance of power in our federal system.

Petitioner submits that this Court should review this case because the court below ignored the body of law developed by

2. Aid to the Aged, Blind, and Disabled (AABD); Old Age Assistance (OAA); Aid to Families with Dependent Children (AFDC); Aid to the Blind (AB); Aid to the Permanently and Totally Disabled (APTD); Federal Food Stamp Program; Aid to the Disabled (AD) are but a few of the many programs of cooperative federalism established by Congress to implement social-welfare policy.

this Court defining the distribution of power in our federal system. The only rationale supporting the result of this case as it now stands is that in schemes of cooperative federalism, traditional rules of jurisdiction and power have no applicability. In particular, and as will be discussed by sections A, B, and C immediately following, the case as it now stands indicates that traditional jurisdictional limitations imposed by established principles emanating from the Supremacy Clause, sovereign immunity, and the law of equity have no applicability to schemes of cooperative federalism.

(A)

This case presents the question of whether a state court has the subject matter jurisdiction to restrain a federal agency functioning under a program of cooperative federalism from complying with its federal regulations because the state court believes the federal law should be "enforced"[3] differently from that expressed in those regulations. If a state court does have this power, then the effect of Article VI, Clause 2 of the United States Constitution (Supremacy Clause) on federal agency regulations and activities vis a vis state courts must be re-defined to accommodate the new federalism represented by schemes of cooperative federalism. For as this Court has traditionally defined the Supremacy Clause's effect on the relationship between federal rules and activities and state courts, such state court action would clearly be prohibited.

This Court has established the rule of law that federal agency regulations have the same effect as Congressional enactments.[4] This rule was established so that federal agencies could without constant interference by the courts carry out the intent of Congress in areas in which complete Congressional legislation would be impractical. However, the result of this parity of federal

3. To understand why petitioner uses the word "enforce," and how this issue originated, see Footnote 1, *supra.*

4. *Federal Crop Ins. Corp.* v. *Merrill,* 332 U. S. 380 (1947).

regulations with Congressional acts is to make the following syllogism true: The Supremacy Clause makes all laws of the United States the supreme law of the land binding on every judge in every state; federal agency regulations are conterminous with the laws of the United States; federal regulations are binding on every judge in every state. Thus, under this view, the Supremacy Clause specifically denies a state court the subject matter jurisdiction to order a federal agency in a scheme of cooperative federalism not to comply with its federal regulations in an effort to enforce federal law differently from that expressed in the regulations. To hold otherwise means that either the federal regulations in federal-state cooperative programs are in some way different from other federal regulations or that the Supremacy Clause has a different effect on regulations in schemes of cooperative federalism. Either position draws an important distinction with untold effects on federal law.

If a state court is allowed to assume this power under schemes of cooperative federalism, then the traditional notion that the Supremacy Clause prohibits state court interference with federal agency activities involving only federal officials performing their duties must be altered. This Court has long ruled that a state court lacks subject matter jurisdiction to interfere with federal officials in the performance of their federal duties. *United States* v. *Tarble*, 13 Wall. U. S. 397 (1872); *Ableman* v. *Booth and United States* v. *Booth*, 21 How. U. S. 506 (1859); and *M'Clung* v. *Silliman*, 6 Wheat. U. S. 598 (1821). The general proposition enunciated by these cases is that due to the supreme authority of the United States and its law, no state court has jurisdiction to intrude into the sphere of the national government and interfere with federal officers executing its law. This concept was restated by Mr. Justice Frankfurter in *Feldman* v. *United States Oil & Ref. Co.*, 322 U. S. 487, 490, 491 (1944):

> "Conversely, a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations

> of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommodations to it may be."

This traditional concept of the Supremacy Clause's limiting effect upon state court jurisdiction directly conflicts with the concept that a state court can restrain a federal agency from following federal regulations in an effort to enforce federal law. Under the traditional concept, the regulation of this type of federal activity could only be accomplished by some governmental instrumentality in the federal sphere. Thus, to allow a state court to restrain a federal agency in a scheme of cooperative federalism from following its regulations would mean that the traditional notion of jurisdictional limitation imposed by the Supremacy Clause on state courts has no application in schemes of cooperative federalism.

Such departure from the traditional notion of the Supremacy Clause's jurisdictional limitations would have serious national ramifications. With the ever-increasing use of federal-state cooperative programs by Congress to institute important social-welfare policies, millions of Americans would be affected. If a state court is allowed this subject matter jurisdiction, then both Congress's purpose in establishing a federal-state cooperative program and the federal scheme of administration of such programs are subject to state court review and interpretation. Problems of national uniformity in the implementation of these programs would arise. And, finally, the extent of federal jurisdiction would be greatly altered by allowing a state court to assume powers heretofore in the exclusive jurisdiction of the federal courts. These possible ramifications give this question such importance that it merits the attention of this Court.

(B)

The first question for review poses problems as to the role of the doctrine of sovereign immunity in schemes of coopera-

tive federalism. Normally, a state court injunction restraining a federal agency from complying with its federal regulations would be viewed as one issued against the United States since the effect of the decree is to interfere with public administration and restrain the Government from acting. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682 (1949); *Land* v. *Dollar*, 330 U. S. 731 (1947); and *Louisiana* v. *McAdoo*, 234 U. S. 627 (1914). Under the traditional concept of the doctrine of sovereign immunity, such state court action would be precluded.

This Court has attempted to outline the doctrine of sovereign immunity in the three landmark decisions of *Dugan* v. *Rank*, 372 U. S. 609 (1963); *Malone* v. *Bowdoin*, 369 U. S. 643 (1962); and *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*. In those cases, this Court decided that a United States official or agent could be sued only if it were alleged that the agent was acting outside the scope of the Congressional enabling statute or it were alleged that the agent was acting pursuant to an unconstitutional statute. This Court has not been presented with the issue of whether these allegations are necessary in order to maintain a suit against the federal government in schemes of cooperative federalism. This case, therefore, provides this Court an opportunity to decide this issue since the state court made no finding when restraining the federal agency from complying with its regulations that the regulations were either outside the scope of the enabling statute or unconstitutional.

If this Court decides that a state court in schemes of cooperative federalism can enforce federal law by restraining the federal agency from complying with its regulations, then this Court must decide that sovereign immunity has no application to these programs. Before reaching that result, this Court must decide that the policies behind sovereign immunity are not served or are outweighed by the reasons for allowing such jurisdiction.

The doctrine of sovereign immunity is a traditional legal

concept resulting from the weighing of the general public good achieved by unfettered federal governmental action versus the need to protect individual interests. On the one hand, this Court recognized that the federal government could not devise and administer federal programs which would serve the interests of each citizen of this nation and that to allow the interruption of the federal government's public administration by lawsuits instituted by those pursuing their own individual interests would force subservience of public interests to individual interests. On the other hand, certain individual interests had to be protected even if it meant additional hardships to public administration and public interests. The result of these antithetic considerations was for this Court to strike a compromise between them in *Dugan*, *Malone*, and *Larson*, *supra*. This Court decided to protect individual interests from federal governmental overreaching by allowing lawsuits when overreaching occurred; but, if the federal governmental body was acting within its constitutional and legal scope, then the individual's only resort was to the normal political process.

This Court is now being asked to decide the issue of whether this compromise is to apply to schemes of cooperative federalism. In the case at bar, a state court restrained a federal agency from following its regulations without a finding of overreaching in an attempt to enforce federal law in accommodation with local interests. The state court forced subservience of the federal scheme of public administration of this program to local interests. Due to the unique nature of schemes of cooperative federalism, it may be that the traditional concept of sovereign immunity has no application and that state courts should be able to malleableize programs of cooperative federalism to make them more responsive to local interests. However, with the possibility of an increase in litigation due to the complexity and conflict which cooperative federalism introduces to our federal system, perhaps a careful examination of all sides of this question will reveal a need to retain this doctrine. This may be especially true in

order to preserve the intent of Congress in pursuing national uniformity and national social-welfare policies as well as promoting the public interest through implementation of cooperative federalism. With such significant Congressional purpose in the balance, a careful review of this question by this Court is warranted before allowing the lower court's decision to stand.

(C)

If this Court allows state courts to have jurisdiction in schemes of cooperative federalism to enjoin federal agencies from complying with their regulations in order to enforce federal law differently from that expressed in the regulations, then this Court must discard a traditional rule of equity stating that a court has no power in equity to enjoin compliance with federal rules and regulations unless there is a finding that the rules and regulations are outside the scope of the Congressional enabling statute or unconstitutional. *Waite* v. *Macy*, 246 U. S. 606 (1918); *Colorado* v. *Toll*, 268 U. S. 228 (1925); *Wells* v. *Roper*, 246 U. S. 335 (1918); and *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165 (1893).

Two important factors contributed to the establishment of this equitable rule. First, this rule served to prohibit courts from substituting their interpretation of federal law through the exercise of their equitable powers for that of the federal agency created and designed by Congress to interpret and enforce that federal law. The rule developed out of this Court's recognition of the fact that a federal agency's expertise in a certain area of federal law makes that body better able to interpret and enforce the federal law than courts which lack this expertise. This Court has long ruled that courts should not substitute their judgment for that of a federal agency unless the latter is guilty of some overreaching. Another factor which contributed to the establishment of this equitable rule is this Court's desire to preserve the separation of powers. If state courts are allowed to freely substitute their interpretation of federal law for that of a

federal agency, are they not on the verge of exercising legislative powers rather than judicial powers?

A decision allowing state courts to enjoin federal agencies from complying with their regulations in order to enforce federal law signifies that state courts have finally achieved a status which enables them to substitute their interpretation of federal law for that of the federal agency created for such interpretation. Perhaps this new rule of law is justified so that state courts in schemes of cooperative federalism may temper federal law to make it more responsive to local interests. On the other hand, this new rule of law could result in as many interpretations of the federal law in a program of cooperative federalism as there are states. In the case at bar, the state court's interpretation of the federal law in an *ex parte* proceeding resulted in tolling the petitioner's period for review for approximately six months without even affording the petitioner a hearing in which the petitioner could present its reasons for objecting to such delay. Could not other state courts following the same logic toll other similar periods of review for eight, twelve, or even sixteen months under the guise of enforcement? Before this new rule is finally adopted this Court should review this question to insure that by its adoption Congress's social-welfare policies for the nation are served and not thwarted.

II.

Another significant question presented by this petition is the ability of the judicial branch of state governments in schemes of cooperative federalism to interfere with federal programs where the state has agreed "to conform to federal requirements."

With respect to the legislative branch in schemes of cooperative federalism, this Court, by reason of such agreement, decided that any state law or regulation inconsistent with federal terms and conditions is to that extent invalid. *King* v. *Smith*, 392 U. S. 309 (1968); *Carleson* v. *Remillard*, 406 U. S. 598 (1972) and *Townsend* v. *Swank*, 404 U. S. 282 (1971).

This Court also decided that a federal time requirement, specifically pertinent here, is binding on a state legislature and that any contrary state legislative action is invalid. *Rodriguez* v. *Swank* (1970), 318 F. Supp. 289 Aff'd 403 U. S. 901 (1971) and *Edelman* v. *Jordan*, 415 U. S. 651 (1974). In neither case was a state legislature allowed to vary the federal time requirement.

Unanswered by the Supreme Court is the question as to whether such an agreement by a state is binding upon its judicial branch.

The court below decided that the judicial branch of state governments can create inconsistency and conflict with federal requirements and policies by the interposition of consent decrees,[5] in particular, and state court action,[6] in general.

The decision below cast state courts in a role which the Supreme Court denied state legislatures.

If state courts are cast in a role different from state legislatures, a dangerous precedent will result. It will open the door for courts of each state to rewrite portions of federal statutes and regulations with which they disagree, as amply demonstrated in this case. A gradual erosion by the states of the prompt review and other requirements established by these statutes and regulations may begin, and thereby jeopardize the rights of many persons under the various federal-state social-welfare programs.[7]

5. In light of the instant case, this busy Court should pause to ponder what the consequences may be to federal requirements and to the federal rights of non-parties by the use of state court consent decrees.

6. State court action is state action. *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

7. Aid to the Aged, Blind, and Disabled (AABD); Old Age Assistance (OAA); Aid to Families with Dependent Children (AFDC); Aid to the Blind (AB); Aid to the Permanently and Totally Disabled (APTD); Federal Food Stamp Program; Aid to the Disabled (AD) are a few of the many programs of cooperative federalism which would be particularly vulnerable to state court interference since they have been, and constantly are, the targets of state legislative interference.

Moreover, this precedent will seriously undermine the intent of Congress in setting up programs of cooperative federalism which is to provide federal funds to the states with certain "strings attached" to assure that the states administer the funds with fairness, equality and uniformity throughout the Nation. The states are not compelled to join these programs: but if they decide to take the money, their courts as well as their legislatures must meet the obligations imposed. What had been mandatory federal regulations implementing this Congressional intent may now be reduced to such a weakened state as only to represent Congressional wishful thinking. Consequently, the matter presented is of exceptional importance meriting the attention and consideration of every member of this distinguished Court.

Therefore, as an important unanswered question in the federal-state relationship, this Court should now define the role of the state judicial branch, as it did in the case of the legislative. Especially, should the petition be granted since the decision below is devoid of any reference to, or reason for departure from, the great body of law establishing the binding effect of federal requirements upon states accepting federal funds.

III.

This Court has in innumerable decisions held that the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution protect a person's life, liberty, property, and fundamental rights. In the third question for review the petitioner is asking this Court to decide whether a federal right to agency review within time limits set by federal law under a program of cooperative federalism is a right within the ambit of rights and interests which are to be afforded the minimal safeguards of Due Process of law under the United States Constitution.

The answer to this question has considerable importance to the future guarantee of personal rights under our Constitution.

The question presents a federal right which cannot easily be classified within any one of the historic divisions of rights and interests protected under the Due Process clauses of the Fifth and Fourteenth Amendments. And yet, the federal right to agency review within the time limits set by federal law is more valuable to petitioner than most of the petitioner's property interests which clearly the Fifth and Fourteenth Amendments protect. The essence of this question is, therefore, whether the concept of Due Process is to be given an expansive meaning so as to include within its protection many rights and interests unknown at the founding of this nation but which now are vital guarantees to the welfare of individual citizens.

This Court has indicated that Due Process must be given an expansive meaning to function in our changed society. Pointing out the difficulty of classifying many rights and interests under the historic divisions, this Court stated in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), footnote 8:

"8. It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government; subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale LJ 1245, 1255 (1965). See also Reich, The New Property, 73 Yale LJ 733 (1964)."

This question likewise presents a type of right difficult to classify but around which our society is presently building.

A federal right to review within a definite time is an important right. Such federal right is found in most of our nation's social-welfare programs. Thus, a decision by this Court indicating the extent to which this right is to be safeguarded will have impact upon almost every citizen of this nation who expects or is receiving a benefit from the federal government. Without the very minimum safeguards which Due Process requires, these Americans may have only superficial rights. The case at bar presents a perfect example of how meaningless this federal right may be without Due Process safeguards.

In 1974 a hospital competing for capital expenditure reimbursement with this petitioner under § 1122 of the Social Security Act (42 USC § 1320a-1), had its application denied by the Secretary's "DPA" for Indiana. Soon thereafter, that hospital filed an action in an Indiana state court seeking judicial review of the "DPA's" action. Several other hospitals likewise competing with petitioner for capital expenditure reimbursement became parties to that lawsuit. The petitioner never became a party to the lawsuit.

On May 27, 1975, the state court in this lawsuit among the competing hospitals dismissed the action for lack of subject matter jurisdiction over the "DPA" since it was a federal agency. However, within the same breath that it was dismissing the action for lack of subject matter jurisdiction, the state court issued an injunction specifically enjoining the Secretary's "DPA" for Indiana from reviewing the petitioner's application within the time limits set by federal law. The state court specifically named the petitioner, Lakeside, in that injunction even though petitioner was not a party to that lawsuit. Even more egregious is the fact that the state court issued the injunction against petitioner without effecting service of process on petitioner by which

notice of the action and a chance to be heard could have been afforded petitioner.

Petitioner's federal right to review within established time limits was totally ignored in the above court action. Petitioner contends that if some court should attempt to alter his right to review, at the very least, the Due Process minimums of notice and an opportunity to be heard should be a pre-requisite to the court's action. Petitioner asks only from this Court that it be afforded the minimum constitutional protection of "fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Milliken* v. *Meyer*, 311 U. S. 457 (1940).

CONCLUSION.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Upon review, the error of the court below should be corrected. Since Lakeside did not receive a review of its application, or notice of rejection within the period of time required by the federal Act and Regulations, and since failure of notification of rejection constituted automatic approval of its application, Lakeside, as a matter of law, is entitled to a declaration that it receive reimbursement for capital expenditures.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC.,
Petitioner,

vs.

INDIANA STATE BOARD OF HEALTH; STATE OF INDIANA; CASPER W. WEINBERGER; SECRETARY OF HEALTH, EDUCATION AND WELFARE; PARK-VIEW MEMORIAL HOSPITAL, INC.; THE LUTHERAN HOSPITAL, INC.; ST. JOSEPH'S HOSPITAL OF FORT WAYNE, INC.,
Respondents.

PETITIONER'S APPENDIX.

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PETITIONER'S APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana
Fort Wayne Division

LAKESIDE MERCY HOSPITAL, INC.,
Plaintiff,
vs.
INDIANA STATE BOARD OF HEALTH, ET AL.,
Defendants.
Civil No. F 75-68

MEMORANDUM OF DECISION AND ORDER

This case is before the court on motions by each of the defendants to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted, Rules 12(b)(1) and (6), Fed. R. Civ. P.,[1] and upon plaintiff's cross-motion for summary judgment, Rule 56, Fed. R. Civ. P. Defendants have submitted affidavits and other documentation in connection with their respective motions, such that the court may now treat these motions, where they rest on Rule 12(b)(6), as seeking relief under Rule 56. *See* Rule 12(b), Fed. R. Civ. P.[2]

1. Motion under 12(b)(1) by Parkview incorporated with its answer, Aug. 8, 1975, with brief; motion under 12(b)(1) by St. Joseph incorporated with answer, without brief, Aug. 11, 1975; motion under 12(b)(1) and 12(b)(6) by the Secretary, incorporated with its answer of Aug. 12, 1975, with brief, joined in by the ISBH and Parkview, Sept. 8, 1975, with separate briefs; motion under 12(b)(1) and 12(b)(6) by the ISBH incorporated in its answer, Aug. 13, 1975, without brief. Motions originally submitted without briefs have now been so supported, pursuant to local rule 7(b).

2. Plaintiff objects to the automatic treatment of the 12(b)(6) motion as a motion for summary judgment. However, this procedure is so well established that plaintiff cannot now claim surprise.

The facts, although complicated, are not in dispute. Plaintiff is a not-for-profit organization incorporated under the laws of Indiana seeking to build and operate a hospital in the vicinity of Fort Wayne, Indiana. The controversy in this case arises over the procedures whereby the promoters of a proposed hospital (or the owners of an existing hospital) may recoup their capital expenditures in part by federal repayments made under various federal health programs, in particular Medicare/Medicaid.

In this suit plaintiff seeks a declaratory judgment under 28 U. S. C. A. §§ 2201-02 that its proposed capital expenditures are eligible for consideration by the Secretary of Health, Education and Welfare, pursuant to Section 1122 of the Social Security Act (42 U. S. C. A. § 1320a-1), and to compel the Secretary to consider and act upon their application. Jurisdiction is said to lie under 28 U. S. C. A. §§ 1331, 1343(3), 1343(4), 1361, and 2201-02. Plaintiff's claim is that the defendants in various ways have failed to follow the procedures required by 42 U. S. C. A. § 1320a-1, and have deprived plaintiff of due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment.[3]

The purpose and operation of Section 1320a-1 can best be understood in the context of other federal provisions supporting hospital construction. Probably the oldest and best known program in this area is the "Hill-Burton" program, which channels federal funds to the states to support construction and modernization of hospitals and other medical facilities. Under this Act (Public Health Service Act § 601 *et seq.*, 42 U. S. C. A. § 291 *et seq.*) a participating state submits a state plan to the Secretary, updated annually, which designates a particular state agency to administer the Hill-Burton program within that state, to determine need for new or expanded hospital facilities, and to submit recommendations to the Secretary whenever an applicant submits proposals for new capital expenditures. Of course, an

3. Presumably, plaintiff's due process claim against the federal officials rests upon the Fifth Amendment.

applicant may build a hospital notwithstanding disapproval by the Hill-Burton state agency; the applicant cannot hope, however, to be reimbursed by the federal government.

Similar administrative machinery is established for the Comprehensive Health Planning Program under the Public Health Service Act § 314(a), 42 U. S. C. A. § 246. Here federal funds are channeled to states which submit and have approved by the Secretary a state plan for Comprehensive Health Planning. Again, there is a state agency designated as the agent of the Secretary for purposes of screening applications to verify conformity under the approved state plan.[4]

Until the enactment of 42 U. S. C. A. § 1320a-1, the repayment provisions of Medicare/Medicaid and other direct payment provisions supported by federal funds did not take into consideration whether the participating hospitals' facilities had been constructed in accordance with the various state plans relevant to Hill-Burton and other programs. Since Medicare/Medicaid would pay a hospital's "reasonable costs," and since depreciation, debt service, and other capital-related costs could reasonably be apportioned to the fee structure, a hospital could circumvent the Hill-Burton requirements and still recover from the federal government a substantial part of its initial capital expenditure. Thus the federal government would be subsidizing the construction of hospitals which, under Hill-Burton, had been determined to be unnecessary for appropriate delivery of health services in the area and thus were to be discouraged.

In 1972, Congress enacted Section1320a-1 (Social Security Act § 1122) to remedy this situation. Under this section, the Secretary is empowered to enter into agreements with the Governors of the various states, whereby a state agency will be appointed as a designated planning agency for 1320a-1 approval. The state agency is to develop a state plan for determining the necessity and evaluation of proposed capital expenditures, with

4. Hill-Burton and Section 314(a) and (b) programs have recently been consolidated. *See* Public Law 93-641 (1975).

the approval of the Secretary, and thereafter to screen and make recommendations on individual proposals for capital expenditures submitted by proposed or existing hospitals within the state. The procedures by which the state agency is to pass upon individual applications are, under the agreement between the Governor and the Secretary, to be made in conformity with the regulations promulgated by the Secretary and in conformity with the Act (42 U. S. C. A. § 1320a-1). Unless the Secretary determines otherwise, or unless the state agency rejects the proposed expenditure, the Secretary is to approve the capital expenditure for purposes of reimbursing, by way of Medicare/Medicaid payments, the portion of the fees allocable to return of depreciation, debt service, and other capital-related expenditures. If the state agency disapproves the expenditure, an appeal to the Secretary will lie; the Secretary's final determination is not reviewable in court. 42 U. S. C. A. § 1320a-1.

The State of Indiana has entered into an agreement with the Secretary pursuant to Section 1320a-1. By that agreement the Indiana State Board of Health (hereinafter ISBH) is named the Secretary's "Designated Planning Agency" pursuant to the Act. As more fully explained below, plaintiff's claim is that by operation of law the ISBH should be deemed to have approved its application for capital expenditures under the Act, such that the Secretary should now be compelled to accept or deny the application. The ISBH, joined by the Secretary, contends that the application has in fact been properly rejected as a matter of law, such that there is no application upon which the Secretary can act. The consequences to plaintiff, if it is correct, are that the Secretary would thereupon pass upon plaintiff's application, and, if approved, plaintiff would be eligible for federal repayment of that portion of the Medicare/Medicaid bills it forwards to the Government as can be ascribed to a return of its capital expenditure and debt service. If defendants are correct, plaintiff may nonetheless build its hospital, but when it submits its Medicare/Medicaid bills for payment by the Government the

Secretary will disallow that portion of the bills that represents a return of capital expenditure by depreciation or otherwise.

Plaintiff's application for approval of proposed capital expenditures had its genesis in a decision in 1973 by state health authorities that additional hospital beds were needed in the Fort Wayne area. By 1973, the ISBH had concluded that existing facilities were inadequate and that proposals for adding 172 beds should be entertained. The groundwork was then laid for amending the state's Hill-Burton plan to reflect this new need, such that the approved construction plan, whether in the form of a new hospital or as additions to existing hospitals, could qualify for Hill-Burton funds. A similar plan was proposed for the state's Section 1320a-1 plan.

Responding to these developments, two competing groups of interested individuals formed corporations for the purpose of constructing and operating a hospital to fill the need. The first to complete and submit its proposal, Community Hospital of Fort Wayne, sought a 156-bed facility. Although the Community Hospital proposal was generally approved by regional authority, the ISBH rejected the proposal on July 5, 1974, since at that time the Secretary had not yet approved the ISBH's proposed amended state plan whereby a new hospital could qualify for Hill-Burton funds.[5]

After a rehearing and appeal had failed, Community Hospital sought review of the ISBH decision in Allen Circuit Court, Allen County, Indiana. At the time it sought this judicial review, Lakeside Mercy (the competing group) had completed and submitted to the ISBH its own proposal for a new hospital. After the case had been venued to Wells County Circuit Court, Community Hospital moved for and received a temporary restraining order (December 9, 1974) and thereafter a preliminary injunction (December 31, 1974) whereby the ISBH was prohibited

5. At that time, the Hill-Burton plan called for three hospitals in the Fort Wayne area, an allocation already filled. The amended plan, since approved, calls for a fourth hospital.

from acting on *any* competing proposal for health facilities in the Fort Wayne area during the pendency of the suit. In this way, should Community's petition for review be granted, and if it was found that the ISBH should have approved the application, the issue would not have been rendered moot by the action of the ISBH on a competing application. The ISBH interpreted the court's orders to apply to Lakeside Mercy's proposal, and thereafter refused to process the application. Lakeside was not made a party to the proceedings in Wells County Circuit Court, nor did it attempt to intervene in those proceedings.

The three existing Fort Wayne hospitals did, however, intervene in that suit. Their interests were thereafter protected when the state court dismissed the complaint on May 27, 1975, *inter alia* on the grounds that it had no jurisdiction under the Indiana Administrative Adjudication Act to review the actions of the ISBH where, as here, it was acting as an agency of the federal government. In the order of dismissal, however, the court enjoined the ISBH from further acting on *any* competing proposal until the existing hospitals submitted through channels their own plan for meeting the 172-bed need in the Fort Wayne area by adding new beds to their own facilities. The proposals of Parkview, Lutheran and St. Joseph Hospitals (the three existing hospitals) were received by the ISBH June 30, 1975, whereupon the ISBH renewed its active consideration of Lakeside Mercy's proposal. On July 9, 1975, the ISBH disapproved the Lakeside Mercy proposal, in part because the proposed rate structures were not found to be economically feasible. On the same day it approved the joint application of the existing hospitals and forwarded its recommendations to the Secretary.

Plaintiff does not directly challenge the grounds upon which the ISBH rejected its applications; hence, it does not seek the traditional form of judicial review of agency decisionmaking. Rather, it proposes two challenges of a different nature: First, that by the time the ISBH purported to rule on Lakeside Mercy's

proposal, the proposal had already been accepted as a matter of law; and second, that the ISBH involved itself in encouraging the three existing hospitals to submit a competing bid in competition with plaintiff. In the latter regard, Lakeside urges that the Wells Circuit Court order holding in abeyance ISBH consideration of Lakeside's proposal until the three existing hospitals could submit a bid of their own was entered into collusively, and that by virtue of many meetings and telephone conversations between the ISBH and the three hospitals, the ISBH actively solicited and encouraged a competing bid such that Lakeside's application could be rejected, yet the health needs of Fort Wayne could be adequately met.

Lakeside does not contend that the approved proposal of the three hospitals does not in fact conform to the state plan or the Act and regulations thereunder. Nor does it challenge the adverse determination of the ISBH in its own application, other than its assertion that by that time the ISBH was supposedly without power to make a negative recommendation.

Plaintiff's challenge to the ISBH's authority to make a negative recommendation rests upon the provisions of 42 U. S. C. A. § 1320a-1(d)(1)(B)(i), the implementing regulation 42 C. F. R. §100.106(a)(4) (1974), and the agreement between the Secretary and the State of Indiana whereby Indiana chose to participate in the 1320a-1 program.[6]

Title 42 U. S. C. A. § 1320a-1(d)(1)(B)(i) provides in relevant part that the Secretary shall disallow capital expenditure recoupment if the state designated planning agency has rejected the proposal "within a reasonable period after receiving

6. It appears that by inadvertence the agreement reached between the Secretary and the State of Indiana omitted the relevant language of 42 C. F. R. § 100.106(a)(4) upon which plaintiff relies. All parties concede that this provision should have been made part of the agreement, and that it is binding on the State as though it had been made part of the agreement. Part of the relief plaintiff seeks is a declaration under 28 U. S. C. A. §§ 2201-02 that the provision is binding upon the State of Indiana and the ISBH, and to this extent plaintiff is entitled to relief.

[notice of an intended expenditure]." Stated another way, the Secretary shall take up the proposal for consideration if the state agency has unreasonably delayed its decision. The Secretary's regulations implement this provision by requiring that: "The failure of the designated planning agency to provide any [notification of rejection] within the time limitations set forth above shall have the effect of a [favorable] determination. . . ." 42 C. F. R. § 100.106(a)(4) (1974). Thus, if within the time period required by the regulations[7] the ISBH does not disapprove the capital expenditure, the proposal is deemed approved, and must be accepted by the Secretary for consideration.

Under the practice of the ISBH, followed by counsel in this case, the running of this period during which the ISBH must rule is generally referred to as the "time clock." The status of applications before the ISBH is always described according to the number of days remaining on their time clock. It is Lakeside's contention that its time clock had run prior to the ISBH determination adverse to it on July 9, such that a declaratory judgment should issue declaring the status of its application to be that it stands approved by operation of law. It is conceded by all that on December 9, 1974 there was still time on Lakeside's time clock; that if the injunction of the Wells Circuit Court entered that day was effective to stop the running of the clock, and if the order of May 27, 1975 continuing the injunction until the new proposals were received was effective to stop the clock, then the ISBH acted within the remaining time when it determined Lakeside's application on July 9, but that if either injunction was ineffective to stop the clock, then the automatic

7. The precise number of days in which the ISBH must act will vary according to the imminence of the proposed capital expenditure, *see* 42 C. F. R. §§ 100.106(a)(1), (a)(4), and according to interim agency actions taken with regard to the application, *see* 42 C. F. R. § 100.106(a)(3). In any event, the period will be between 60 and 90 days. In this case, although it is unclear how many days plaintiff may initially have had, it is stipulated by all that on December 5, 1974 the ISBH had 19 days remaining in which to consider plaintiff's application.

approval of Lakeside's application should be found as a matter of law. It should be noted that although 42 U. S. C. A. § 1320a-1(d)(2) allows the Secretary to reject a negative finding of the state designated planning agency, the provisions of Section 1320a-1(d)(1) require that except where the planning agency had not received adequate notice, or except where the planning agency has issued a negative recommendation, the Secretary *"shall"* allow the recoupment of capital expenditures.

The refusal of the ISBH and the Secretary to proceed upon its recommendations constitutes, according to plaintiff, a violation of the Act and the Secretary's own regulations thereunder, denies plaintiff due process of law, and denies it the equal protection of the laws. The activities of the ISBH in conjunction with the proposals of Lutheran, Parkview, and St. Joseph Hospitals are likewise alleged to be in violation of statutory and constitutional mandates. Plaintiff therefore alleges in its complaint a cause of action arising under 42 U. S. C. A. § 1320a-1, 42 U. S. C. A. § 1983, 42 C. F. R. § 100.106 (1974), the Fourteenth and presumably also the Fifth Amendments to the Constitution.

Jurisdiction

As jurisdictional bases for its statutory and constitutional claims, plaintiff seeks to rely upon the provisions of 28 U. S. C. A. §§ 1331 (federal question), 1343(3) and (4) civil rights), 1361 (mandamus), and 2201-02 (declaratory relief).

Title 28 U. S. C. A. § 1331 provides for jurisdiction where "the amount in controversy" exceeds the statutory amount of $10,000 and the dispute is one "aris[ing] under the Constitution, laws, or treaties of the United States." Defendants assert that neither the proper amount in controversy nor a real federal question is present in this case.

The "matter in controversy" the value of which must exceed $10,000 must be shown by plaintiff's complaint as aided by the documents submitted in opposition to the motion to dismiss.

The issue in controversy is plaintiff's right to participate in a federal program of reimbursement of expenditures. Defendants join in the assertion that the amount in controversy is the value of the right to be free of the Secretary's regulations which are imposed on a hospital once it receives federal funds. Of course, it should be noted that plaintiff is actively seeking to come under these regulations. Plaintiff responds that the value in controversy is the cost of the hospital to be built. Defendants rightly point out that whether or not plaintiff succeeds on the merits it can build its hospital.

In determining whether there is the requisite amount in controversy to found jurisdiction on 28 U. S. C. A. § 1331, the burden is on the plaintiff to allege and prove each jurisdictional fact, even where the challenge to the court's jurisdiction has been suggested by the defendant. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178 (1936). Where the claim is for money damages, the court's role is to ascertain whether there is "a legal certainty that the claim is really for less than the jurisdictional amount" upon defendant's motion for dismissal. *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U. S. 283, 288-89 (1938). But where, as here, the suit is not for damages, the motion to dismiss "calls for substantial proof on the part of the [plaintiff] of facts justifying the conclusion that the action involves 'value' in the necessary amount. . . . And the existence of such 'value' is to be measured by that which the [plaintiff] seek[s] to gain by [its] action—the pecuniary consequences to [it]." *Breault* v. *Feigenholtz*, 380 F. 2d 90, 92 (7th Cir. 1967), *cert. denied*, 389 U. S. 1014 (1967). It will not defeat jurisdiction even if this "value" is only potential or contingent. *See Sears, Roebuck & Co* v. *American Mut. Liab. Ins. Co.*, 372 F. 2d 435 (7th Cir. 1967). The question is one of probabilities, and plaintiff must show that the pecuniary consequences to it probably exceed the jurisdictional amount. *See Jeffries* v. *Silvercup Bakers, Inc.*, 434 F. 2d 310, 311-12 (7th Cir., 1970).

The pecuniary consequence to plaintiff in this suit for declaratory judgment is its eligibility for federal funds by way of reimbursement for approved capital expenditures. If plaintiff is successful on the merits, and if the Secretary thereafter approves the application, plaintiff will be entitled to a substantial claim for federal funds when it submits its Medicare/Medicaid bills for repayment. If plaintiff is unsuccessful, and if it nonetheless proceeds to build its hospital, it must forego its claim under Medicare/Medicaid for that portion of its billings which are allocable to capital-related expenses and depreciation. It is immaterial that the amount is contingent on the hospital actually being built, and on the Secretary's ultimate approval, for without a determination that plaintiff's application should be deemed approved as a matter of law, there is no application before the Secretary upon which he can act.

The amounts which plaintiff would probably receive under the maternal and infant care program (42 U. S. C. A. §§ 701-16), under the provisions for the aged and disabled (42 U. S. C. A. §§ 1395-1395pp), and under Medicare/Medicaid (42 U. S. C. A. §§ 1396-1396i) are dependent upon so many variables that precise computation is impossible. Despite this, there is a virtual certainty that the reimbursable return of depreciation and other capital-related expenses would exceed $10,000. Although the proposed capital outlay which Lakeside would undertake has not yet been reduced to a sum certain, plaintiff's estimate of a capital expenditure in excess of $3,000,000 appears to be reasonable. By way of comparison, the competing proposal by the existing hospitals calls for capital expenditures in excess of $18,000,000 to meet the same bed requirements.

If this expenditure is approved, plaintiff will be able to recoup a share of the depreciation of the hospital over its useful life; that is, some share of the entire $3,000,000 will be reimbursable from federal funds under 42 U. S. C. A. § 1320a-1. In addition, plaintiff will be able to recover a share of its debt service on this expenditure, and some share of its other capital-related expenses.

The share of these aggregate expenditures which will be reimbursable over the life of the hospital will be determined by the share of its billings which are to be repaid by Medicare/Medicaid and other federal programs. If two-thirds of Lakeside's patients present their bills for federal repayment, then two-thirds of Lakeside's depreciation and other capital expenses will be repaid by the Government. Even taking Lakeside's conservative estimate of initial cost, and ignoring debt service and all other expenses, it is clear that for the amount in controversy to be $10,000 or less, fewer than one-third of one percent of Lakeside's patients would have to be Medicare/Medicaid recipients. There is, by reasonable implication, a probability that at least $10,001 is in controversy.

Defendant Parkview, in its preliminary brief in support of its motion to dismiss, suggests that this suit does not really and substantially involve a federal question. Although the central dispute in this suit as raised by defendants' answers concerns the effect of a state court restraining order, the existence of a federal question is to be ascertained solely from plaintiff's well-pleaded complaint. *Gully* v. *First National Bank*, 299 U. S. 109 (1936). Plaintiff alleges an entitlement to federal funds, noncompliance with a federal statute by an agency of the government, and denial of constitutional rights by federal agents. The controversy involves the construction of a federal statute and the regulations issued thereunder. In a very real and immediate sense, there is federal involvement. *See Gully, supra* at 114.

Accordingly, there is jurisdiction under 28 U. S. C. A. § 1331. The propriety of finding jurisdiction under other statutes,[8] although extensively briefed by the parties, need not be decided,

8. It is thus unnecessary to enter into the conflict over whether 28 U. S. C. A. § 1361 is jurisdictional at all, *see United States* v. *Commonwealth of Pennsylvania*, 394 F. Supp. 261, 263-64 and nn. 3-4 (M. D. Pa. 1975) and cases there cited. Although many of defendants' objections to 1343(3) and (4) jurisdiction and to "jurisdiction" under the Declaratory Judgment Act are well taken, a ruling is unnecessary.

since each of plaintiff's substantive claims may be considered under the federal question jurisdiction.

The State Court Injunctions

Plaintiff's case in chief is syllogistic: Federal regulations required the ISBH to act upon plaintiff's application within 15 days after December 9, 1974, or else the application would be deemed to be approved; the ISBH did not act on the application until July 9, 1975; therefore, the application should be deemed approved. Plaintiff also notes that except for one exception not relevant here, the time clock requirement is unqualified.

Defendants in turn seek to impose a qualification, by reasonable inference, upon the otherwise absolute time clock mandate. It is their contention that an injunction issued by a court of competent jurisdiction[9] restraining the designated planning agency from proceeding with *all* proposals necessarily tolls the time clocks as to those proposals.

It appears without contradiction that on October 4, 1974, Community Hospital (a group competing with Lakeside and with the existing hospitals) filed suit in Allen County Circuit Court, Indiana, seeking review of the ISBH's rejection of its proposal to meet the bed shortage in the Fort Wayne area. At this time Lakeside's proposal was awaiting consideration by the ISBH, and the existing hospitals' proposals were before a subordinate body ("Region 3"). On November 12, 1974, Community amended its complaint to include Region 3 as a party defendant, and sought temporary restraining orders enjoining the ISBH and its subordinate agency from proceeding further with the existing hospitals' competing applications. This relief was found to be appropriate because of the time clock requirement, and

9. Plaintiff contends that to allow a state court to interfere with the federally mandated timetable in this case would serve as precedent for allowing state courts to enjoin any federal agency proceeding. The crux of the matter is subject jurisdiction. Except where Congress places exclusive federal jurisdiction in the federal courts, there is no objection where a state court with jurisdiction over the parties enforces federal law.

on November 12 the temporary restraining order was issued. This order did not affect the ISBH consideration of plaintiff's proposal. Plaintiff does not challenge the state court's jurisdiction thus far, or the propriety of issuing this TRO.

On November 26, 1974 the ISBH requested a change of venue from Allen Circuit Court. It appears that on the same day, Lutheran, St. Joseph and Parkview Hospitals sought to intervene as parties defendant in that suit so as to protect their interests. On December 9, 1974, before the three hospitals had been technically permitted to intervene as defendants, all parties accepted the Wells Circuit Court as the court to which venue would be taken. That same day, counsel for Parkview, a putative intervenor, deposited with the Wells Circuit Court a copy of the record thus far in the case, which it had itself assembled (Parkview noted at the time the Clerk of the Allen Circuit Court had been unable in the interval to assemble and transmit the transcript). On December 9, 1974, the same day, the Wells Circuit Court renewed and modified the temporary restraining order initially issued by the Allen Circuit Court. It is this order which first precluded the ISBH from acting upon Lakeside's proposal. The order provided:

> The Indiana State Board of Health is further enjoined and ordered not to consider, act upon, or approve (including any election to take "no-action" whenever such non-action would constitute approval) on any proposals by any other person, firm or entity which proposals are designed or intended to meet substantially the same need or to provide substantially the same health care facilities as the proposal of the plaintiff in this action. . . .

Lakeside's proposal, then before the ISBH, would have provided for substantially the same health care, and would have met substantially the same needs, as the proposal by Community Hospital. On December 18, 1974 the TRO was renewed, and on December 31, 1974 the restraining order was superseded by a preliminary injunction *pendente lite*, entered with the consent

of the parties, which incorporated the same prohibition against ISBH consideration of *all* competing proposals. Cross-motions for summary judgment were thereafter filed, and on May 27, 1975 the Wells Circuit Court entered summary judgment for the defendants. With the conclusion of the litigation, the injunction *pendente lite* was dissolved, but as part of the relief sought by the defendant hospitals the court issued a new injunction whereby the ISBH was prohibited from proceeding with Lakeside's proposal until the proposal of the existing hospitals could be transmitted from Region 3, which was then considering it. This relief was justified because the court's previous orders had frozen consideration of all proposals at whatever level they were then pending. That is, the joint proposal of Parkview, Lutheran, and St. Joseph Hospitals had been frozen at the Region 3 level by the restraining order of November 13, 1974, while Lakeside's proposal before the ISBH was not frozen until December 9, 1974. By allowing Region 3 to complete its investigation while holding ISBH consideration of Lakeside's application in abeyance, the court in effect returned the applicants to the same relative positions they would have been in had the court not issued the separate restraining orders on November 13 and December 9.

It is plaintiff's contention that the temporary restraining order of December 9, the renewal on December 18, and the preliminary injunction of December 31 were issued without jurisdiction, such that they had no effect on ISBH's duty to process Lakeside's application. Assuming without deciding that for federal purposes the rule 100.106 time clock will be tolled only where an injunction against its running has been issued by a court whose jurisdiction is properly laid as a matter of state law, it nonetheless appears that the Wells Circuit Court properly obtained jurisdiction on or prior to December 9, 1974.

The order book entry of the Allen Circuit Court *granting* the motion for change of venue was made November 26, 1974. On December 9, 1974, the parties stipulated that venue would

be changed to Wells Circuit Court. On the same day, venue was *accepted* by order of that court.

The problem, simply stated, is when does the receiving court acquire jurisdiction to issue emergency orders. In Indiana, the process for effecting a change of venue appears to be simple, but the effect of the various steps on the courts' respective jurisdiction is ambiguous. In general, once a motion for change of venue has been filed, the court retains jurisdiction only to determine and grant the motion. However, after granting the motion and until the change of venue is completed, the original court retains the power to issue emergency orders, such as the temporary restraining order at issue in this case. *Smith* v. *Indiana St. Bd. of Health*, 303 N. E. 2d 50 (Ind. App. 1973); *cf.* Ind. Tr. Rule 78.

The completion of the change of venue is described in Tr. Rule 78: "either party to the cause may file a certified copy of the order making such change in the court to which such change has been made, and thereupon such court shall have full jurisdiction of said cause, regardless of the fact that the transcript and papers have not yet been filed with such court to which such change is taken." The latter provision appears to be a reference to Ind. Code § 34-1-13-2 (Burns 1973), where it appears that perfection of the change of venue required the transmittal of the transcript and papers. To the extent that Tr. Rule 78 and Ind. Code § 34-1-13-2 conflict, the Trial Rule governs. *Hutchison* v. *Wheeler*, 251 Ind. 386, 241 N. E. 2d 261 (1968).

It thus appears that in order for the receiving court to have "full jurisdiction," a party need only receive a certified copy of the order granting the change of venue from the clerk of the original court and file the copy with the clerk of the receiving court. In this case, however, this procedure was not precisely followed. Parkview's affidavit submitted to the Wells Circuit Court recites that the Clerk of the Allen Circuit Court refused to timely certify the change of venue order, "claiming that he lack[ed] sufficient personnel to make the copies in conformance

to the rules and procedures of the Clerk of Allen County." Counsel for Parkview thereupon paid to the clerk the costs for transfer of the case, and caused the transcript and record to be reproduced at his own direction, and filed this record, under his own affidavit, with the Wells Circuit Court.

It appears that the record thus transmitted was satisfactory to all the parties and to the Wells Circuit Court. Lakeside does not claim that the record was not complete or that it had been altered. The official record was not transmitted to the Wells Circuit Court until January 16, 1975.

Resolution of this jurisdictional problem rests upon an analysis of the purpose of Tr. Rules 76 and 78. Rule 76 broadly provides that the change of venue, and hence of jurisdiction, shall be effective upon the issuance of the *order granting* the change of venue. Jurisdiction of some sort passes immediately to the receiving court, upon its selection. Rule 78, however, explains the circumstances under which the original court is fully ousted of its jurisdiction when the change of venue is granted. That is, the "some jurisdiction" granted to the receiving court by Rule 76 becomes "full jurisdiction" in that court once a certified copy of the change of venue order is filed. The power of the original court to issue necessary emergency orders prior to granting the change of venue (Tr. Rule 78), or prior to the time the receiving court has received the record of the proceedings such that it can intelligently issue emergency orders (*see Smith, supra*) are instances in which the original court retains "some jurisdiction" and the receiving court acquires "some jurisdiction." Case decisions involving this problem (*see Smith, supra*, and cases there discussed) have ruled only as to the extent of the original court's retained jurisdiction, and have not addressed themselves to the question of the receiving court's acquired jurisdiction. The rationale of the *Smith* decision, and of *Indianapolis Dairymen's Co-op* v. *Bottema*, 226 Ind. 260, 79 N. E. 2d 409 (1948) and *State ex rel. Gwin* v. *Spencer*, 220 Ind. 337, 43 N. E. 2d 724 (1942), is that the mechanics of

venue change must provide the parties with a convenient forum in which emergency matters can be determined. Consistent with this, the better rule is that once the change of venue has been *granted* and the receiving court has *accepted* the case, the litigants at their option may seek emergency relief in either the original court pursuant to *Smith, supra,* or in the receiving court pursuant to Tr. Rule 76. The presence or absence of the record, whether officially certified or not, is not a jurisdictional prerequisite, *see* Tr. 78, but in the discretion of the receiving court the absence of the complete record may be grounds for refusing the emergency relief sought.

It appears that the Wells Circuit Court was satisfied with the state of the record it then had, and that it had jurisdiction to issue the temporary restraining order of December 9, 1974. Plaintiff urges that since the materials were transmitted to the Wells Circuit Court by counsel for Parkview, not then a party, the requirements of Rule 78 were not met. But since Rule 78 determines when the original court is ousted of its jurisdiction, not when the receiving court first obtains jurisdiction, at most this would mean that the Allen Circuit Court could have entertained the motion for temporary restraining order until January 16, 1975. It does not mean that the Wells Circuit Court could not likewise have entertained the motion. Under the unusual circumstances of this case, the conclusion is warranted that the Wells Circuit Court acted within its jurisdiction.

Turning to the merits of the injunctions, including the injunction issued May 27, 1975, Lakeside urges that the injunctions were improper since they affected the rights of a nonparty. Under such circumstances, Lakeside would properly have had the right to intervene to assert and defend its interests. It chose not to do so. And since the ISBH was properly a party before the Wells Circuit Court, Lakeside in effect urges that the ISBH should have determined that the injunction was improper, and should thereupon have proceeded to process Lakeside's application. Even assuming *arguendo* that the injunctions were in some way improper, the ISBH's duties are clear:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Maness v. *Meyers,* 95 S. Ct. 584, 591 (1975). Injunctive orders *pendente lite* affecting the rights of nonparties are no different. *Cf. Nebraska Press Ass'n* v. *Stuart,* 96 S. Ct. 237 (1975).[10]

The final question is whether 42 U. S. C. A. § 1320a-1 and 42 C. F. R. § 100.106(a)(4) by inference permit the tolling of an applicant's time clock under the circumstances of this case. Section 1320a-1 requires that applications be processed within a "reasonable period after receiving [notice of the intended expenditure]." Nowhere does this provision suggest an exception to the "basic proposition that all orders and judgments of courts must be complied with promptly," *Maness, supra,* 95 S. Ct. at 591. Indeed, it would be unreasonable to require the designated planning agency to process competing applications at a time when pending litigation might establish a prior entitlement in a previously unsuccessful applicant. The Secretary agrees, however, that the time clock regulations as written simply did not anticipate the situation of this case, and that the otherwise absolute time requirement should be construed to include by inference a tolling provision whenever the designated planning agency is subject to jurisdictionally appropriate court-ordered restraint. This construction is sound, and avoids unnecessary friction between the agencies and the courts.

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10. Lakeside's argument that the injunctions were not issued in conformity with Ind. Tr. Rule 65 are matters which affect the validity of the injunction, not the jurisdiction, and therefore are not relevant in ascertaining the ISBH's duty to obey the injunction between its issuance and its dissolution.

Accordingly, the court finds that Lakeside's time clock did not restart until June 30, 1975, at which time Region 3 transmitted the proposals of the existing hospitals to the ISBH, and that the adverse decision rendered July 9, 1975, was within the 15-day period remaining on Lakeside's time clock.[11]

Since Lakeside is clearly not entitled to a declaratory judgment holding the status of its application to be approved as a matter of law, there are no grounds for considering the jurisdiction for or the merits of plaintiff's claims under 28 U. S. C. A. § 1361.

In light of the foregoing discussion, plaintiff's claim that the ISBH's obedience of the injunctions denied it due process of law or the equal protection of the laws is without merit.

"Conspiracy"

Plaintiff's amended complaint added new allegations concerning a certain agreement among the ISBH and the three existing hospitals. The factual predicate as alleged is that "with the consent and knowledge of the Indiana State Board of Health, the three existing Fort Wayne hospitals . . . have devised a plan and scheme under which they have allocated to themselves exclusively the bed allotment . . . for the Fort Wayne area." Plaintiff therefore seeks as relief an injunction prohibiting the ISBH from acting on the joint application. Since the ISBH has already approved the joint application, plaintiff's relief would now be against the Secretary.

The undisputed facts are these: On May 27, 1975, the Wells Circuit Court dissolved its injunction in which Region 3 had been prohibited from considering the proposals of the existing hospitals for fulfilling the bed allocation in the Fort Wayne

11. It was stipulated that on December 5, 1974, only 19 days remained on Lakeside's time clock. *See* note 7 *supra*. The injunction against consideration of Lakeside's proposal was entered December 9, 1974, that is, 4 days later. Hence, as of December 9, there were 15 days remaining on the time clock.

area. At that time, each hospital's proposal was independent of the others; consequently, the total beds sought was in excess of the maximum permissible. By that time, it was clear that Community's proposal was ineligible, for the reason (as accepted by the Wells Circuit Court) that the Hill-Burton plan, while authorizing an additional 172 beds for the Fort Wayne area, did not authorize the construction of a new hospital to meet that need. Although the ISBH had proposed an amendment to the Hill-Burton plan whereby a fourth hospital could be considered, approval by the Secretary was not issued until July 3, 1975. Hence, the ISBH's only pending application—Lakeside's—was likewise defective in that it also called for a new hospital.

Starting around May 30, 1975, the existing hospitals initiated meetings and telephone conversations with the officers of the ISBH in an attempt to discuss the feasibility of a joint proposal by the existing hospitals (permissible under the then-existing Hill-Burton plan) to meet the 172-bed allocation. The ISBH encouraged the hospitals to agree among themselves on a bed allocation and to submit a joint revised proposal based on that bed allocation. By the terms of the injunction then in force, the ISBH would withhold consideration of Lakeside's proposal until it received this joint proposal. If the amendment to the Hill-Burton plan were not forthcoming, the ISBH would then have to reject Lakeside for the same reasons it had to reject Community; if the amendment were accepted, it could consider Lakeside and the joint proposal on an equal footing. It should be noted that if the Hill-Burton plan had not been amended, then no combination of existing proposals would have adequately met the full 172-bed need in the Fort Wayne area.

Plaintiff's challenge to this procedure must first withstand the test of standing. Plaintiff does not challenge the ISBH's finding that its own proposal was not in conformity with the state plan, nor does it challenge the ISBH's determination that the existing hosiptals' joint proposal did conform to the state plan. Even should this court order the Secretary to reject the

joint proposal (a form of relief which is only debatably within the power of this court), plaintiff would still not be entitled to approval of its own proposal. Plaintiff's "personal stake in the outcome of the controversy" is tenuous at best. *See Sierra Club* v. *Morton*, 405 U. S. 727, 732 (1972); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). But even if plaintiff may proceed as a "private attorney general," *Sierra Club* v. *Morton*, *supra*, 405 U. S. at 737-38; *Association of Data Processing Serv. Org.* v. *Camp*, 397 U. S. 150, 154 (1970), in that there is no other likely class of plaintiffs who would challenge agency favoritism in approving Section 1320a-1 determinations, on the merits there is no basis for plaintiff's claim. The ISBH's encouragement of the joint proposal was for the legitimate purpose of obtaining conforming proposals for the construction of hospital facilities. At the time the ISBH first became aware of the hospitals' desire to submit a joint proposal, the decision in the Community Hospital case foreclosed consideration of Lakeside's proposal unless the Hill-Burton plan was successfully amended. Conforming proposals could come only from the existing hospitals. Those proposals, however, independently sought various numbers of beds which, when taken together, surpassed the maximum allowance. When at the instance of the existing hospitals the ISBH was asked whether it would be permissible to propose a joint bid, maximizing the number of beds in the Fort Wayne area, consistent with the then-existing Hill-Burton plan, it was not illegal for the ISBH to "encourage" this voluntary solution to the bed allocation problem. There is no evidence that the motivation of the ISBH in encouraging this joint proposal was favoritism towards the existing hospitals; rather, it appears that the ISBH was justifiably concerned that it would soon have no acceptable proposal before it because of the delay in the approval of the Hill-Burton plan amendment.

Order

Accordingly, plaintiff's motion for summary judgment is granted in part, and to that extent it is hereby declared and adjudged that the Agreement between the Secretary of Health, Education and Welfare and the State of Indiana made pursuant to 42 U. S. C. A. § 1320a-1 contains the following provision, which is binding on the State, its agents and employees:

> The failure of the designated planning agency to provide any such notification within the time limitations set forth above shall have the effect of a determination described in paragraph (a)(4)(i) of this section.

In all other respects, plaintiff's motion for summary judgment is denied.

Defendants' motions to dismiss for lack of jurisdiction over the subject matter are each denied.

Defendants' motions to dismiss for failure to state a claim on which relief can be granted are treated as motions for summary judgment pursuant to Rules 12(b) and 56, Fed. R. Civ. P., and are denied insofar as partial summary judgment has been granted above to plaintiff; in every other respect the motions are granted, and judgment shall be entered that plaintiff is entitled to no relief except that specifically above granted.

Entered this 10th day of February, 1976.

/s/ JESSE E. ESCHBACH
United States District Judge

UNITED STATES DISTRICT COURT
For the Northern District of Indiana
Fort Wayne Division

LAKESIDE MERCY HOSPITAL, INC.,	}	Civil Action No. F 75-68
vs.		
INDIANA STATE BOARD OF HEALTH, et al.		

JUDGMENT

This action came on for decision before the Court, Honorable Jesse E. Eschbach, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff's motion for summary judgment is granted in part, and to that extent it is hereby declared and adjudged that the Agreement between the Secretary of Health, Education and Welfare and the State of Indiana made pursuant to 42 U. S. C. 1320a-1 contains the following provisions, which is binding on the State, its agents and employees:

> The failure of the designated planning agency to provide any such notification within the time limitations set forth above shall have the effect of a determination described in paragraph (a)(4)(i) of this section.

In all other respects, plaintiff's motion for summary judgment is denied. Defendants' motions to dismiss for lack of jurisdiction over the subject matter are each denied. Defendants' motions to dismiss for failure to state a claim on which relief can be granted are treated as motions for summary judgment pursuant to Rules 12(b) and 56, Fed. R. Civ. P., and are denied insofar

as partial summary judgment has been granted above to plaintiff; in every other respect the motions are granted and judgment shall be entered that plaintiff is entitled to no relief except that specifically above granted.

Dated at Fort Wayne, Indiana, this 11th day of February, 1976.

/s/ (Illegible)
Clerk of Court

/s/ (Illegible)
Deputy

Copy to:
U. S. Attorney
Robert J. Parrish
David K. Hawk
Terry J. Kindle
Martin T. Fletcher

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued October 20, 1976

December 30, 1976

Before

HON. TOM C. CLARK, *Associate Justice (Retired)**
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

LAKESIDE MERCY HOSPITAL, INC., *Plaintiff-Appellant,*

No. 76-1354 *vs.*

INDIANA STATE BOARD OF HEALTH, et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

No. CV 75-68-F

Jesse E. Eschbach, Judge

ORDER

Plaintiff originally brought this civil rights action under 42 U. S. C. § 1983 against the Indiana State Board of Health, the State of Indiana, and the Secretary of Health, Education and Welfare (HEW) on June 12, 1975. The plaintiff, a prospective hospital, described itself as an Indiana not-for-profit corporation with its principal place of business in Fort Wayne, Indiana. Plaintiff stated that on December 13, 1973, it had filed with the Indiana Board of Health an application for review of proposed

* Associate Justice Tom C. Clark (Retired) of the Supreme Court of the United States is sitting by designation.

capital expenditures under Section 1122 of the Social Security Act (42 U. S. C. § 1320a-1) to build a new hospital "to meet the need for additional hospital facilities and services in Region 3 in the State of Indiana." That provision was enacted to assure that federal funds appropriated under the Social Security Act not be used to support unnecessary capital expenditures for health care facilities. Consequently, Section 1122 provided for the HEW Secretary and a state to make an agreement under which a designated planning agency, here the Indiana Board of Health, would submit recommendations to the Secretary with respect to capital expenditures proposed by any health care facility or health maintenance organization within the state. The agreement between the Secretary and the State of Indiana was attached to the complaint as Exhibit A. Plaintiff charged that the Indiana Board of Health failed to complete its review of plaintiff's application within the time required by that agreement and Section 100.106 of HEW's regulations.[1] The detailed prayer for relief, consisting of nine paragraphs, principally sought a judgment that plaintiff's proposed capital expenditure was in conformity with the Indiana health plan and directing the HEW Secretary to act thereon.

Eighteen days later, plaintiff filed a supplemental complaint adding the Parkview Memorial Hospital, the Lutheran Hospital and St. Joseph's Hospital, the only existing Fort Wayne hospitals, as additional defendants. According to the supplemental complaint, those hospitals had also filed applications with the

1. These regulations appear in 42 CFR § 100.106. Plaintiff complained that the agreement between the HEW Secretary and Indiana wrongfully omitted the following part of Section 100.106 (a)(4) of the regulations:

> "The failure of the designated planning agency to provide any such notification within the time limitations set forth above shall have the effect of a [favorable] determination described in paragraph (a)(4)(i) of this section."

The district court subsequently granted that part of plaintiff's motion for summary judgment requesting a declaration that such provision must be considered to be contained in the HEW-Indiana agreement.

Indiana Board of Health for review of proposed capital expenditures under Section 1122 of the Social Security Act for additions to their hospitals. Plaintiff asserted that under the health plan adopted for the State of Indiana, it had been determined that only 172 more hospital beds were needed for the Fort Wayne area, with construction costs for such facilities to be reimbursed under the Social Security Act. Plaintiff alleged that the three Fort Wayne hospitals "devised a plan and scheme under which they have allocated to themselves exclusively [that] allotment * * * for the Fort Wayne area."

Plaintiff charged that the Indiana Board of Health was to review the applications of the existing Fort Wayne hospitals on July 9, 1975, even though plaintiff's application covering the beds in question was assertedly already approved by operation of law by the Indiana Board of Health. Plaintiff sought a permanent injunction restraining the Board of Health from reviewing the application of the three Fort Wayne hospitals.

The record shows that Parkview Memorial Hospital, St. Joseph's Hospital and Lutheran Hospital each wished to expand its bed capacity and that plaintiff and Community Hospital of Fort Wayne, Inc., another potential hospital, wished to build new hospitals in the Fort Wayne area. The Indiana health plan originally indicated that an additional 172 beds were needed in the Fort Wayne area, but with only three hospitals to be permitted. However, effective July 3, 1975, HEW approved an amendment to the plan to permit a fourth hospital in the Fort Wayne area.

On October 25, 1973, Community Hospital proposed the construction of a 156-bed general hospital. When its application was turned down because the Indiana health plan at that time authorized only three hospitals, Community Hospital filed a petition for review in the circuit court of Allen County, Indiana, and requested an injunction to prevent the Indiana Board of Health from taking action on the expansion proposals of the three existing Fort Wayne hospitals. After a change of venue,

on May 27, 1975, the circuit court of Wells County ruled against Community Hospital and ordered the Board of Health to process simultaneously Lakeside's proposal and the expansion proposals of the three existing Fort Wayne hospitals. On July 9, 1975, the Board approved the revised proposals of the three existing hospitals and rejected Lakeside's proposal. HEW's Regional Health Administrator approved the recommendations on August 8, 1975.

On February 10, 1976, the district court filed an opinion granting summary judgment to defendants, except in one minor respect.[2] *Lakeside Mercy Hospital, Inc.* v. *Indiana State Board of Health, et al.*, 421 F. Supp. 193 (N. D. Ind. 1976). We agree with that well-reasoned decision and adopt Judge Eschbach's opinion as our own. Therefore, the judgment is affirmed.

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2. See note 1 *supra*.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 27, 1977

Before

HON. TOM C. CLARK, *Associate Justice (Retired)**
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

LAKESIDE MERCY HOSPITAL, INC., *Plaintiff-Appellant,*	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 76-1354 *vs.*	
INDIANA STATE BOARD OF HEALTH, et al., *Defendants-Appellees.*	No. CV 75-68-F Jesse E. Eschbach, Judge.

ORDER

On consideration of the petition of the appellant, Lakeside Mercy Hospital, Inc., for a rehearing by the Court, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellant for a rehearing is denied.

REGULATION 42 C. F. R. § 100.106

(a) The Agreement shall provide for the following notification and review procedures:

(1) The designated planning agency shall establish, maintain, and disseminate to all health care facilities and health maintenance organizations within the State procedures under which timely written notice of the intention to make a capital expenditure subject to this subpart is required to be given (i) to the designated planning agency in which case such agency shall distribute copies of such notice to those other agencies described in § 100.105 whose respective fields of responsibility cover the proposed expenditure, or (ii) simultaneously to the designated planning agency and to those other agencies described in § 100.105 whose respective fields of responsibility cover the proposed expenditure. Such notice shall set forth the date on which the obligation is expected to be incurred, and must be received by the designated planning agency not less than 60 days prior to such date.

(2) Such notice shall be submitted in such form and manner and shall contain such information as may be required by the designated planning agency to meet the needs for all the agencies whose respective fields of responsibility cover the proposed expenditure. The designated planning agency shall promptly publicize its receipt of such notice through local newspapers and public information channels.

(3) If the notice under this paragraph is found by the designated planning agency to be incomplete, such agency shall notify the person proposing the capital expenditure within 15 days of its receipt of such incomplete notice, advising such person of the additional information required. Where such timely notification of incompleteness is provided, the period within which the agency is required to notify the person proposing such expenditure that such expenditure is not approved, as required by section 1122(d)(1)(B)(i) of the Act and paragraph (a)(4) of this section, shall run from the date of receipt by the agency of a notice containing such additional information.

(4) Except as provided in paragraph (a)(3) of this section, the designated planning agency shall, prior to the date set out in

the written notice of intention submitted pursuant to paragraph (a)(1) of this section as the expected date for the obligation of the proposed expenditure (but, subject to the provisions of paragraph (a)(3) of this section in no event later than 90 days after the receipt of such notice unless the person proposing the capital expenditure agrees to a longer period), provide written notification to the person proposing such capital expenditure (i) that such capital expenditure has been determined by such agency to be in conformity with the standards, criteria and plans described in § 100.104(a)(2); or (ii) that such agency has elected not to review the proposed capital expenditure (which election shall be equivalent to a determination by such agency that such expenditure is in conformity with such standards, criteria and plans), in which event the designated planning agency shall notify the Secretary of its reasons for electing not to review the proposed capital expenditure; or (iii) that such agency after having consulted with, and taken into consideration the findings and recommendations of, the other agencies described in § 100.105 (to the extent that such proposed capital expenditure is within the respective fields of responsibility of such other agencies), has determined that the proposed capital expenditure would not be in conformity with the standards, criteria, or plans described in § 100.104(a)(2). The failure of the designated planning agency to provide any such notification within the time limitations set forth above shall have the effect of a determination described in paragraph (a)(4)(i) of this section.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC.,
Petitioner,

vs.

INDIANA STATE BOARD OF HEALTH; STATE OF INDIANA; CASPER W. WEINBERGER; SECRETARY OF HEALTH, EDUCATION AND WELFARE; PARK-VIEW MEMORIAL HOSPITAL, INC.; THE LUTHERAN HOSPITAL, INC.; ST. JOSEPH'S HOSPITAL OF FORT WAYNE, INC.
Respondents.

JOINT RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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AUTHORITIES CITED.

Cases.

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28 U. S. C. A. § 1254(1) 2

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DPA Manual, Section VI(f) 5, 15, 17

House Report (Wayne and Means Committee) No. 92-231; 1973, U. S. C. C. A. A. N. 4989, 5004, 5065, 5288 (May 26, 1971); House Conference Report No. 92-1605, 1972 U. S. C. C. A. A. N. 5380, 5383 (October 14, 1972) 23, 24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC.,
Petitioner,

vs.

INDIANA STATE BOARD OF HEALTH; STATE OF INDIANA; CASPER W. WEINBERGER; SECRETARY OF HEALTH, EDUCATION AND WELFARE; PARK-VIEW MEMORIAL HOSPITAL, INC.; THE LUTHERAN HOSPITAL, INC.; ST. JOSEPH'S HOSPITAL OF FORT WAYNE, INC.,
Respondents.

JOINT RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondents, Parkview Memorial Hospital, Inc., the Lutheran Hospital, Inc. and St. Joseph Hospital of Fort Wayne, Inc. jointly respond to and respectfully pray this Court deny the petition of Plaintiff-Appellant-Petitioner (Lakeside) for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Memorandum of Decision and Order of Judge Eschbach of the United States District Court for the Northern District

of Indiana, Fort Wayne Division, entered February 10, 1976, is reported at 421 Supp. 193, appears at pp. 1-23 of Petitioner's appendix. The unanimous opinion of the United States Circuit Court of Appeals for the Seventh Circuit dated December 30, 1976, Tom C. Clark, Luther M. Swygert and Walter J. Cummins, presiding, appears at pp. 26-29 of Petitioner's appendix. The Order denying the Petition for an en banc hearing dated January 27, 1977 appears at page 30 of Petitioner's appendix.

JURISDICTION.

This Court's jurisdiction is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Lakeside presented a variety of issues to the District Court and fourteen (14) separately stated "issues for review" to the Circuit Court of Appeals. Petitioner now states three new issues for review in support of its Petition for Writ of Certiorari. These Respondents do not agree that these issues are accurately or clearly stated and would restate the issues presented as follows:

I.

Whether the State Court orders are subject to collateral attack?

II.

Whether the ISBH agreement with the Secretary prevented the exercise of jurisdiction by the State Court under the Indiana Administrative Adjudication Act.

III.

Whether in the facts and circumstances of the present case, the Petitioner has been deprived of due process by the action of the ISBH in recommending to the Secretary that

the capital expenditures proposed to be incurred in the construction of the fourth hospital not be reimbursed to the Petitioner?

CONSTITUTION, STATUTE AND REGULATIONS.

Included in this Respondent's Appendix are the following:

Attachment 1—"Limitation on federal participation for capital expenditures". P. L. 92-603, 43 U. S. C. A. Sec. 1320a-1. (Section 1122)

Attachment 2—Subchapter I, Part 100, Subpart A—"Limitation on Federal Participation for Capital Expenditures" 42 C. F. R. Sec. 100.106.

Attachment 3—DPA Manual—Sec. VI—"Fair Hearing under Section 1122 and State Action."

Attachment 4—Indiana Administrative Adjudication Act I. C. 4-22-1-1 and 2, 14-19.

Attachment 5—Well Circuit Court—Judgments.

STATEMENT OF THE CASE.

The decisions of the District Court at pp. 2-9 of the appendix and of Court of Appeals at pp. 26-29 each contain an accurate Statement of the Case. The Petitioner's Statement of the Case at pp. 4-6 is redundant, confusing and inaccurate. To put these issues in the proper perspective it is important to point out several misstatements:

1. At p. 4, paragraph 1, Petitioner says: "This program (1122 Review) is designed to upgrade health care facilities throughout the nation by reimbursing through repayment provisions of Medicare/Medicade those persons who are about to make capital expenditures . . ."

This statement is inaccurate. The purpose of 1122 is to control "unnecessary capital expenditures". As is stated in Section (a) of the statute itself:

> "The purpose of this section (Section 1122) is to assure that federal funds appropriated under Title V, XVIII, and XIX are not used to support unnecessary capital expenditures." 42 U. S. C. Section 1320a-1.

The purpose of the legislation is, therefore, to do precisely the opposite of what the Petitioner would have the Court do in the instant case—cause the Federal Government to participate in reimbursing for costs incurred in the construction of unnecessary and duplicative health care facilities.

2. At p. 4, paragraph 2 of the Petitioner's Statement of the Case, it is indicated the agency designated by the governor to make recommendations to the secretary under Section 1122 "becomes known as the Designated Planning Agency of the United States, Secretary of Health, Education and Welfare."

The characterization given the state agency as a "department of Health, Education and Welfare" is exactly the opposite of the facts. Section 1122(b) makes it clear that the Secretary's agreement is "with any state which is willing and able to do so." Throughout the statute and applicable regulations, particularly Regulation Section 100.105, the designated planning agency is referred to as the "state agency". The procedure prescribed to be followed in connection with agency review under Regulations Section 100.106 requires the establishment of procedures to be made "by the state". The determination is to be made pursuant to state procedures under Regulation Section 100.106(a). A fair hearing is required to be granted an applicant who receives an adverse determination by the state agency before a "fair hearing examiner" appointed by the governor of the state. Under Regulation Section 100.106(c) the proceedings are "kept in accordance with the requirements of applicable state law" Regulation Section 100.106(c)(2)(iii). Thereafter "judiciary review of such decision" under State Law may be obtained under Regulation Section 100.106(c)(4).

The DPA Manual provides for a "State Appeals Process" and states:

> "The Section 1122 fair hearing process does not modify or replace any of these". DPA Manual Sec. VI(f) Appenddix p. A14.

The purpose and intention of the Regulations and the Manual are to provide a procedure by which the "state agency" reviews and administers the programs established pursuant to the Health Service Act. The suggestion that the Indiana State Board of Health is a "department of the Health, Education and Welfare" is a gross distortion of the fact intended presumably to inaccurately lay a basis upon which the Petitioner subsequently argues improper interference by a State Court in the machinery of Federal Government.

3. At p. 5, paragraph 1, Petitioner Statement of the Case argues the regulations grant each petitioner "his own time clock."

Nowhere in the statute or in the regulations is any petitioner granted any kind of a time clock. This argumentative supposition that each applicant carries about a private time clock in his pocket, and that, among competing applications, the person whose time clock expires first has the most meritorious application, is simply not found in the Regulations. Such an argument may suit the Petitioners' purposes but it again distorts the purposes of the statute by requiring the state agency to recommend approval to the Secretary of the first application filed rather than on the most meritorious. Such an interpretation would cause the Federal Government to reimburse applicants for capital expenditures made by applicants who were most rapid afoot irrespective of whether the proposed expenditures were unnecessary or duplicative.

4. At p. 6, paragraph 1 the Petitioner's Statement of the Case Petitioner inaccurately states that the restraints of the Wells Circuit Court were not "judicial determinations".

The District Court's summary of the State Court proceedings appearing at pp. 13-15 of the appendix and the Circuit Court of Appeals summary of the State Court procedure appears at

pp. 26-29. Each are accurate. After a review of the State Court record both courts were convinced the determinations of the Wells Circuit Court were in fact judicial determinations. For the Petitioner now to premise its arguments on the factual assumption that the State Court Decree is not binding or was merely consensual and thus the State Board of Health was not bound by judicial determinations is simply and entirely inconsistent with the facts. Both the District Court opinion and the Circuit Court of Appeals Opinion which accurately summarize the facts reflects such court determinations and clearly "judicial". A review of the State Court proceedings clearly indicates that the ISBH had no alternative but to abide by the determination of the Wells Circuit Court.

The Decree of the State Court, pp. A21-26 of the Appendix, the record of the proceedings in the State Court as prepared by the Clerk of the Wells Circuit Court and filed in the District Court clearly and unquestionably demonstrate the restraints imposed upon the ISBH by the Decree of the Wells Circuit Court were judicial and not subject to collateral attack. The transcript shows the case was adversary, honestly contested, seriously tried and carefully briefed and determined. The transcript may be accurately summarized as follows:

October 4, 1974: Community Hospital filed a civil suit in the Allen Circuit Court, naming as Defendants the State of Indiana and its Board of Health. Under this complaint, Community asked for (1) judicial review of the decision of the ISBH adverse to Community's proposal to construct a fourth hospital in Fort Wayne, and (2) damages in the sum of One Hundred Thousand Dollars ($100,000.00). At this point in time, Parkview, St. Joseph's, and Lutheran Hospitals had proposals to fill the same health care need pending before the Region 3 HPC. Lakeside also had a proposal to fill this health care need, which was then at the ISBH review level.

October 8, 1974: Community Hospital filed an amended complaint in Allen Circuit Court, which did not change the parties or relief sought but submitted certain exhibits.

October 9 and 10, 1974: Summonses were served upon the State of Indiana and the ISBH .

October 21, 1974: Community Hospital asked for and received an extension of time to file a transcript of the proceedings before the ISBH, wherein its proposal was disapproved.

October 23, 1974: Assistant Attorney General Schaefer appeared for the State of Indiana and the ISBH and asked for and received an extension of time to November 24, 1974, in which to asnwer the complaint.

November 12, 1974: Community Hospital filed its second amended verified petition for judicial review, damages and injunctive relief. By this amendment, the Region 3 HPC was added as a Defendant, and the Plaintiff sought as additional relief (1) a temporary restraining order to prevent the Region 3 HPC from acting to approve and forward to the ISBH the proposals of Parkview, St. Joseph's, and Lutheran Hospitals, and (2) a temporary restraining order against the ISBH.

November 12, 1974: Allen Circuit Court, after making extensive findings of fact, granted a temporary restraining order as Plaintiff sought and set the question of issuing an injunction pendente lite for November 20, 1974.

November 13, 1974: The Plaintiff's second amended petition and the restraining order were served on the Region 3 HPC and Assistant Attorney General Schaefer; and the summons was also served on the Region 3 HPC.

November 18 and 19, 1974: St. Joseph's and Parkview Hospitals petitioned to intervene in the Plaintiff's suit as Defendants on the ground their pending applications to fill the same bed needs were pending before HPC 3.

November 19, 1974: The State of Indiana and the ISBH both requested that the Allen Circuit Court continue the temporary restraining order in effect and set over for thirty (30) days the question of an injunction pendente lite.

November 20, 1974: The Allen Circuit Court granted the continuances requested by the State of Indiana and the ISBH and reset the hearing for December 20, 1974.

November 26,1974: The State of Indiana and the ISBH filed for an automatic change of venue, which the Court

granted. The State of Indiana and the ISBH filed answers to the Plaintiff's second amended complaint.

December 9, 1974: All parties, by stipulation, selected Wells County as the county to which venue would be transferred. The Clerk of the Wells Circuit Court accepted the Docket Sheet of Allen Superior Court No. 74-575. The Stipulation of Venue and all the pleadings from the Allen Circuit Court. Parkview and St. Joseph's Hospitals requested the Court to modify the temporary restraining order of the Allen Circuit Court. This modification was granted. The restraining order, as modified, precluded Region 3 HPC from acting on the proposals of Parkview, St. Joseph's, and Lutheran Hospitals *and,* in addition, precluded the ISBH from acting on Lakeside's proposal (since the "clock" for Lakeside's proposal had again begun to run on December 5, 1974). Lakeside Mercy Hospital, by their counsel, acknowledges receipt of a copy of the temporary restraining order.

December 18, 1974: Wells Circuit Court, on its own motion, continued the temporary restraining order to December 31, 1974, and set that date for a hearing on the question of an injunction pendente lite.

December 31, 1974: Wells Circuit Court, with the consent of all parties, issued an injunction pendente lite, which continued the restraints against any action by the Region 3 HPC and the ISBH.

January 22, 1975: Lakeside submits to the Wells Circuit Court a question of whether the actions in connection with the temporary restraining order and temporary injunction are binding on Lakeside.

March 21, 1975: Community Hospital filed a motion for partial summary judgment. This was met by cross motions filed by the State of Indiana, the ISBH, and Parkview and St. Joseph's Hospitals.

May 27, 1975: Wells Circuit Court entered Findings and Order on Plaintiff's Motion for Summary Judgment and dissolved the injunction pendente lite insofar as it restrained action by the Region 3 HPC. However, the Court continued the injunction insofar as it restrained the ISBH from acting upon Lakeside's proposal until such time as the

ISBH could give simultaneous consideration to the proposals of St. Joseph's, Parkview, and Lutheran Hospitals (Appendix p. A21).

July 10, 1975: The ISBH, in compliance with the May 27, 1975, order of the Wells Circuit Court, considered all proposals, rejected Lakeside's proposal on the grounds that the proposed capital expenditure was not "economically feasible", would create "unreasonable increases" and would not "foster cost conditionment".

The Petitioner's suggestion that the restraints imposed upon the Indiana State Board of Health by the Wells Circuit Court were not "judicial", therefore, badly misleads the Court as to the true nature of the adjudication delaying the ISBH from proceeding with application review while competitive determinations were the subject of Court Review.

5. At p. 6, paragraph 2, Petitioner states the State Court determined it "had no subject matter or jurisdiction to review the Order of the ISBH since it is acting as an agency of the federal government".

This statement is inaccurate and grossly misleading.

The facts of the matter are that the ISBH, as the designated planning agency for Indiana, recommended to the Secretary under authority granted in Section 1122 and pursuant to Regulations Section 100.106(a) that the capital expenditures proposed to be incurred by Community in the construction of a fourth hospital be excluded from reimbursement because the State Plan did not permit a fourth hospital in the Fort Wayne area. Pursuant to Reg. Sec. 100.106(c) Community requested a "fair hearing with respect to the findings and recommendations of the designated planning agency." Thereupon, the governor of Indiana appointed a hearing examiner, the case was reheard, and findings of facts and conclusions of law were submitted by the hearing examiner recommending again a negative recommendation be made to the Secretary. Appendix p. A22.

Thereupon, Community perfected its appeal anticipated under Section 100.106(c)(4) which reads in part as follows:

> ". . . Where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency."

The State Court did not find it lacked jurisdiction since the ISBH was "acting as an agency of the federal government". Rather, finding number two of the Wells Circuit Court entered on May 27, 1975 reads as follows:

> "The Findings of Fact and Conclusions of Law of the Hearing Examiner revise the Findings of the Indiana State Board of Health (ISBH) and constitute a final order or determination made by an agency entitled to Judicial Review under the provisions of the Administrative Adjudication and Court Review Act. (I.C. 4-22-1, *et. seq.*)" Appendix p. A22.

The State Court found it had jurisdiction under I. C. Section 4-22-1 the Indiana Administrative Adjudication Act. That was the jurisdiction alleged in the complaint. Had the Petitioner objected to the Court Review on a jurisdiction basis it could have intervened and raised the question before the trial Court. In fact, the Petitioner did not. Not now until now before the Supreme Court has Petitioner suggested the Wells Court found it lacked jurisdiction.

A review of the State Court decree shows the Court found it had jurisdiction. The State Court proceedings follow precisely that prescribed by the Administrative Adjudication Act. The findings of the Wells Circuit Court follow the findings required by Section 18. They follow the statute almost verbatim:

> "The decision of the Hearing Examiner revises the Findings and Determinations of ISBH but it does not reverse the decision of ISBH and constitutes a determination subject to review under Regulations Sec. 100.104(c) *et seq.* of the Regulations of the Secretary of Health, Education and Welfare.
>
> "The Order, Decision and Determination made by the Hearing Examiner is not:
>
> (a) Arbitrary, capricious, or in abuse of discretion, or not otherwise in accordance with law, nor
>
> (b) contrary to any constitutional right, power, privilege or immunity, nor
>
> (c) in excess of statutory jurisdiction, authority or limitations, or short of statutory rights; nor
>
> (d) without observation of procedure required by law, nor
>
> (e) unsupported by substantial evidence." Appendix p. A24.

The "Stay" issued by the Allen and the Wells Circuit Court against the ISBH while the appeal was pending was necessary in order that the decision of the State Court was not rendered moot by an action of the State Agency. In fact, a stay by the Agency pending review is specifically anticipated in Section 17 of the Act:

> ". . . The judge thereof may enter an order staying the order of determination pending final decision of the Court on said review, upon the filing of the bond conditioned upon the due prosecution of said proceedings for review and that the Petitioner will pay all costs and abide by the order or determination of the agency in question if it is not set aside."

Counsel for the Petitioner acknowledged receipt of a copy of the Court orders and was kept abreast of the litigation. No effort was made to attack the adjudications directly, but rather a collateral attack subsequently launched in the Federal District Court.

The Federal District Court did not conclude as suggested by Petitioner that the Wells Circuit Court lacked jurisdiction.

On the contrary, at p. 15 of the appendix at line 32, the District Court concluded "the Wells Circuit Court properly obtained jurisdiction on or prior to December 9, 1974."

The avowment by the Petitioner that the Hearing Examiner appointed by the governor and that the Wells Circuit lacked jurisdiction under the Indiana Adjudication Act has never before been presented and is totally unsupported by either the record itself or the determinations of the Federal District Court. The factual distortion is an obvious attempt to imprecisely lay the foundation for the collateral attack which was rejected by both the District Court and the Circuit Court of Appeals.

6. At p. 6, paragraphs 3 and 4, Petitioners say:

> "the State Court issued a permanent injunction further prohibiting ISBH from acting specifically on Lakeside's application . . . (and) . . . Lakeside was entitled to have its application processed on an individual basis . . .".

In fact, no permanent injunction was issued. The final decree of the Wells Circuit Court reading as follows:

> "The Motion to Dissolve the Preliminary Injunction filed by the Defendant St. Joseph Hospital of Fort Wayne, Inc., is granted and the preliminary injunction heretofore entered is dissolved except that the Indiana State Board of Health (ISBH) shall take no action on the pending application of Lakeside Mercy Hospital, Inc., until such time as the proposals of the three Fort Wayne hospitals to provide substantially the same health care facilities have been acted upon by Indiana Region 3, Comprehensive Health Planning Council and transmitted to the ISBH so as to permit simultaneous consideration with the application of Lakeside Mercy Hospital, Inc." (Appendix p. A21.)

Lakeside Mercy Hospital was granted a full hearing, permitted to introduce all of its evidence, and all the testimony it cared to introduce in support of its Application. Thereafter, on July 10, 1975, the ISBH, in compliance with the May 27, 1975 Order of the Wells Circuit Court, considering all the proposals and all

the evidence submitted by Lakeside, rejected Lakeside's proposal on the following grounds:

> "7.) That the proposed capital expenditure is not economically feasible and cannot be accommodated in the patient charge structure of the health care facility without unreasonable increases.
>
> 8.) That the proposal will not foster cost containment or will not improve quality of care through improved efficiency and productivity, including promotion of cost effective factors such as ambulatory care, preventive health care services, home health care, and design and construction economics, or through increased competition between different health services delivery systems.
>
> • • • • •
>
> 10.) That the Executive Board has considered that the § 314(b) agency deferred action on the Lakeside Mercy Hospital, Inc., proposal.[1]
>
> 11.) That the proposal of Lakeside Mercy Hospital, Inc., does not come within the exception described in 42 CFR § 100.04(b)(2) since it has not demonstrated proof of capability to provide comprehensive health care services efficiently, effectively, and economically.

Lakeside refused to accept the recommendation of the ISBH. Rather than following the administrative review authorized under Section 1122(b)(3) and Regulations Section 100.106(c), the Petitioner asserted its claims in a collateral attack instituted in the Federal District Court. The attack was clearly collateral

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1. Region 3, Comprehensive Health Planning Council established pursuant to Sec. 314(a)(b) of the Health Service Act, 42 U. S. C. A. § 246(a) in the fall of 1973 had recommended the Lakeside proposal not be endorsed (Record p. 29 Exhibit A, p. 6 l. 13). In a similar analysis, HPC 3 declined to take any favorable action on the Lakeside proposal (*Ibid.* l. 23) and recommended the bed need be met by expansion of the existing hospitals (*Ibid.* p. 7 l. 16). See the Position Paper of HPC 3 and the detailed economic study proposing the approval of the plan to expand existing hospitals (Record p. 29, Exhibit 2). The Lakeside application had also been acted unfavorably by the Review Division of the DPA (Record p. 29, p. 8 l. 2).

to both the administrative review procedures prescribed by the Secretary's Regulations and adjudications in the State Court.

• • •

The "Statement of the Case" which appears in the decision of the District and the Circuit Court of Appeals constitute an accurate synopsis of the facts and issued involved. The case is essentially a chronology of steps taken by the Petitioner trying to obtain reimbursement for capital expenditures for the construction of a new hospital which the planning agencies involved have determined both uneconomical and duplicative. The wide discrepancy between what this case is all about and what the Petitioner states the case is about lays the foundation for the Petitioner's arguments which are outside and unrelated to any issues presented to the District Court or the Circuit Court of Appeals.

REASONS FOR NOT GRANTING THE WRIT.

I.

Upon receiving the recommendation by the ISBH that the Secretary not reimburse Community for capital costs it proposed to incur in the construction of a fourth hospital, Community requested "a fair hearing with respect to such findings". The procedure prescribed to be followed by the ISBH with respect to such "fair hearing" was set out in Reg. Section 100.106(c). Upon an adverse determination by the "fair hearing examiner" Community elected to exercise rights granted it for judicial review under the provisions of the Indiana Administrative Adjudication Act (I. C. 4-22-1, et seq.).

The Indiana Administrative Adjudication Act is intended "to establish a uniform method of court review of all such administrative adjudication". Section 1. The Act provides for a required review any "administrative adpudication" "hearing or determination of any agency with issues or cases applicable to particular

persons" Section 2 thereby clearly granting to Community the opportunity for Judicial Review under the Act. The review provided for in the Act is clearly that anticipated as the "administrative remedy" . . . provided under State law "and not" prejudiced by the fact the proponent has requested and received a fair hearing under Section 1122. Reg. Sec. 100.106(a) (Appendix p. A9) and DPA Manual Sec. VI(f) p. A14 of Appendix.

To protect persons who might be effected, the Act provides in Sec. 17 for "a stay of the action of the agency pending decision by the Court." The injunctive relief issued first by the Allen Circuit on October 4, 1974, and ultimately culminating in the continuation of the temporary injunction on July 10, 1975, was fashioned as a method of avoiding irreparable harm by persons interested in or to be adversly effected by the appeal. Otherwise, the relief sought by Community on appeal would have been made moot by the affirmative action of the ISBH in approving the four competing applications to fill the same health care needs.

Petitioners now make three separate arguments as to why the ISBH was obliged to recommend to the Secretary that its application for the construction of a fourth hospital be recommended for reimbursement. All three arguments hinged upon the premise that the State Court Order is subject to collateral attack. Each argues, in one fashion or another, that this Court should declare that the ISBH has acted favorably upon the Petitioner's application for improvement of capital expenditures for the construction of a fourth hospital, even though

(a) the ISBH acted negatively,

(b) the Petitioner elected not to participate in the State Court proceedings and elected not to directly attack the Order of the State Court, and

(c) The Petitioner failed to exercise the administrative remedies afforded it by Section 1122 and the related Regulations.[2]

In the introductory portion of the Petitioner's arguments at pp. 7 and 8, the Petitioner argues the Writ should be granted because "the Court below ignored the body of law developed by this Court" and because of "jurisdictional limitations imposed by established principles emitted from the supremacy clause." Since there is no citation as to what "body of law" the Petitioner is talking about nor any annunciation of the "established principles" the Petitioner leaves nothing to answer from its introductory paragraph.

(A)

Petitioner states the first question as follows:

> "Whether State Court has subject matter jurisdiction to restrain a Federal Agency . . . ?" (p. 9, paragraph 2, line 2)

There are two things wrong with the question as thus posed:

First, the decision being reviewed under the Administrative Adjudication Act and pursuant to which the State Court exercised jurisdiction was a decision of a State Agency—not the decision of a Federal Agency.

Second, jurisdiction to a review was specifically granted the Wells Circuit Court, not only under the Administrative Adjudication Act, but also under the pertinent Federal statutes, Section 1122, and Regulations Section 101.106(c)(4).

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2. State Agency Review is required to be furnished in practically all Federal funded programs administered by the State. For example, the following State administered programs require "an opportunity for fair hearing before the State Agency". 42 U. S. C. A. Sec. 302 (State Old Age): Sec. 602(a)(4) (Aid to Needy Families); Sec. 1202(a)(4) (State Aid to the Blind); Sec. 1320(a)(1) (Limitation on Capital Expenditures); Sec. 1396a-(a)(3) (Medical Assistance Programs). State judicial review is routinely afforded.

The procedure followed by the State Court in the exercise of its jurisdiction was inconsistent neither with State law nor with the Secretary's Regulations. Section 1122(b)(3) specifically requires that the "governing body or advisory board" . . . "establish and maintain procedures pursuant to which a person proposing any such capital expenditure may appeal a recommendation by the designated planning agency and will be granted an opportunity for a fair hearing . . .". Regulation Section 100.106 (c) specifically indicates that:

> "Any decision of a hearing officer, arrived at in accordance with this paragraph, shall, to the extent that it reverses or revises the findings or recommendations of the designated planning agency, supersede the findings and recommenations of the designated planning agency: *Provided*, That where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency."

The agreement between the Secretary and the State specifically provides that the appeal procedures shall be the appeal procedure specified by State law:

> f. *State Appeals Processes.*
>
> "Many States have appeals processes established for reviewing decisions on health projects, license issuance or revocation, certification for life safety factors, etc. The Section 1122 fair hearing process does not modify or replace any of these. The fact that a proponent has requested and received a fair hearing under Section 1122 does not prejudice the availability of such other judicial or administrative mechanisms as may exist for his use under State law or regulation." Appendix p. A14.

It is specifically provided, therefore, both by statute, by regulations and by the Secretary's agreement, that the procedure anticipated in the Administrative Adjudication Act is a State

procedure and would be controlled by State law. The State law, therefore, made no effort to "enforce" any "Federal Regulations" or exercise any jurisdiction of any Federal Agency. The Court simply exercised the jurisdiction granted it by both the Federal and State law to review the determination of the State Agency.

The Petitioner's real argument is that, while the State Court had jurisdiction, the *exercise* of that jurisdiction in the facts and the circumstances of the present case was improvident. That is, while the jurisdiction of the State Court is conceded by both the statute and the regulations, the fashion in which that jurisdiction was exercised was improper. That is to say, that the Federal Court should now substitute its discreation as to how the State Court should have exercised its jurisdiction in 1974 and 1975. That is to say, that the judgment of the Wells Circuit Court is subject to subsequent review in a collateral attack launched in the Federal Court. Such is clearly not the law. That this suit is in Federal Court does not alter applicable law. As the District Court appropriately found, the State Court deicsion was not subject to collateral attack to any greater extent in Federal District Court than would be permissible in the State Courts in Indiana.

Chicago & A. R. Ry. Co. v. *Wiggens Ferry Co.*, 108 U. S. 18 (1882).

Burns v. *Board of School Commissioners of Indianapolis*, 437 F. 2d 1143 (7th Cir. 1971).

Bowdill v. *Central Home Equipment Co.*, 216 F. 2d 156, *cert. den.* 358 U. S. 936, *reh. den.* 348 U. S. 977 (1954).

Commonwealth of Penn. v. *Williams*, 294 U. S. 176, (1934).

Harrah et al. v. *State ex rel. Fellows*, 36 N. E. 443, 446, 38 Ind. App. 395 (1905).

It is submitted, therefore, that the District Court properly saw and determined the issue with respect to collateral attack. It would have indeed been unwise and improper for the District Court to have interfered by collateral attack in the exercise of jurisdiction by the State Court. It would be doubly unwise and improvident for this Court to now do so.

(B)

The second question proposed by the Petitioner is hidden in the language of the first paragraph on page 12, line 9, which reads as follows:

> "Such State Court action would be precluded . . . by the doctrine of sovereign immunity."

The difficulty with this question is again twofold:

First, the decision reviewed was the decision of a state agency and not that of the Federal Agency. The manual specifically provided that review would the state agency in accordance with normal state procedure. The Federal Government was not a "party defendant" either in the Wells Circuit Court or before the United States District Court. Clearly the State of Indiana and its State Board of Health were the defendants in both cases. It was the decision of the Indiana State Board of Health which was being appealed from and it was Indiana and its Board of Health which, in each instance, was the defendant. Sovereign immunity of the United States is clearly outside the case. In fact has not been suggested at any stage of these proceedings until in this Petitioner's Petition for Writ of Certiorari.

Second, the review sought before the Wells Circuit Court and the relief prayed for there by plaintiff was relief specifically granted to the State Court under the Federal Statute and Federal Regulations. If sovereign immunity was somehow involved, as difficult at that might be to imagine, the Federal law specifically exempted the doctrine from applicability in the present case by the grant of authority to the State to review the action of its

own state agency. Judicial review takes place within the State Court. That places the exercise of jurisdiction in the State Court —not in the Federal Court. There can be no supremacy question in the present case because the Federal Government was not involved. There is no effort by the State to interfere with the action of any Federal officers. There was only the exercise of the State Court jurisdiction to a right of review granted it by Federal law itself. Both the statute and the pertinent regulations placed jurisdiction for judicial review within the authority of the State. It is clear, therefore, that where the State elected to exercise the jurisdiction granted it, it does not assert an improper supremacy over Federal law, but rather exercises the grant of a responsibility specifically designated and delegated to it by the statute. Not only does the statute delegate this responsibility to the State under Section 1122 in its Regulations, but the Regulations themselves require a "fair hearing" and specifically anticipate a judicial review similar to that which occurred in the present case. There is, therefore, no "supremacy" question. The only question involved is whether a Federal Court, acting at this late date, should collaterally review the determination of a State Court acting pursuant to a review procedure specifically granted it by both Federal and State law. The District Court properly decided it should not engage in collateral review of State Court Proceedings.

II.

The next question presented by the petitioner at p. 15, paragraph 2, is similar to the first questions and may be stated as follows:

> "Whether the ISBH agreement with the Secretary prevented the exercise of jurisdiction by the State Court under the Indiana Administrative Adjudication Act."

This question differs from the earlier questions only in the particular as to whether or not the "agreement" deprived the State Court of jurisdiction.

The answer to the question is quite simple. The statute itself makes reference to the "state agency", the regulations prescribed a "fair hearing" be established by the "state agency" and the agreement of the Secretary specifically sets out that the exercise of the jurisdiction by the State Court shall "not prejudice the availability of such other judicial or administrative mechanisms as may exist of his (the applicant's) use under state law or regulation".

Contrary to what the Petitioner says at p. 16 line 4 of its Brief, neither *Edelman* v. *Jordan*, 472 F(2) 985 (7th Cir. 1972), reversed in part in 415 U. S. 651 (1974) nor *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N. D. Ill. 1970) are "pertinent here". Involved in both cases was Section 404 of the Illinois Department of Public Aid Manual which provided that assistance payments for new applications may not be paid for a period prior to the month in which the application was approved. The District Courts in each of the two cases found the State regulations inconsistent and therefore superseded by the Federal regulation requiring "the receipt of sums within 30 days of application". 318 F. Supp. at p. 296 and 415 U. S. at p. 656. In neither case was there involved the grant of jurisdiction to a State Court. There is no administrative or judicial review in either case. Collateral attack of a State Court decree was not involved. It was simply a matter that an inconsistent State regulation had to give way to and be superseded by Federal standards pursuant to which the program was required to be administered.[3]

The cases cited, therefore, in no way bear on any of the issues involved below.

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3. 403 U. S. 901 did not "affirm" the decision in Rodriguez v. Swank other than with respect to the right to amend the complaint and the right to proceed in forma pauperis.

Also, contrary to what the petitioner suggests at p. 16, this Court did not rule on the issue in Edelman v. Jordan. This Court granted jurisdiction in that case only "because of the apparent conflicts on the Sixth Amendment" (415 U. S. at p. 658) and not on any of the matters suggested as involved in this case.

III.

The petitioner's final question may be fairly stated as follows:

> Whether in the facts and circumstances of the present case, the Petitioner has been deprived of due process by the action of the ISBH in recommending to the Secretary that the capital expenditures proposed to be incurred in the construction of the fourth hospital not be reimbursed to the Petitioner?

A.

The facts and circumstances of the present case make it clear that petitioner was given a full and complete hearing, an opportunity for a second hearing, and that most certainly "minimal constitutional protection of fair play and substantial justice, were clearly accorded Lakeside in connection with its application.

In 1973-74 five contesting applications were simultaneously pending before ISBH to fulfill the bed need anticipated for Fort Wayne by the State Plan. Community Hospital elected to submit its application for determination, asked for a fair hearing and then, as also anticipated in Regulation Section and the DPA Manual sought "judicial review of such decision." The Regulations specify that ". . . where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the Designated Planning Agency, shall to such extent supersede the findings and recommendations of the Designated Planning Agency."

Were the ISBH to act favorably on any of the other four competing applications while a fair hearing was in progress or an appeal being obtained, the relief sought by Community—that is, approval of the Community application—would be totally frustrated. If in the interim the ISBH granted an application for a competing right, the right to an appeal by the applicant or the right to judicial review would be totally frustrated because the bed need would have been absorbed by

a competing application. Therefore, out of fairness to the applicant who has sought a fair hearing or judicial review, the State Court determined the ISBH during the appeal had to stand by on competing applications.

B.

It is obvious that HEW interpreted the regulation in question to contain an implied exception to the "automatic approval after 60 days" rule in the event that DPA action upon applications before it is enjoined by a state court. Otherwise, it would not have accepted ISBH's ultimate recommendation that Lakeside's application be rejected. As that interpretation was made by the agency which promulgated the regulation in question, it should be deferred to by the Court, if it is not either inconsistent with the underlying statute or clearly erroneous. *Bowles* v. *Seminole Rock & Fan Co.*, 325 U. S. 410 (1945); *Udall* v. *Tallman*, 380 U. S. 1, *reh. den.* 380 U. S. 989 (1964); *Immigration & Naturalization Serv.* v. *Stanisic*, 395 U. S. 62, *reh. den.* 395 U. S. 487 (1969).

Obviously, the interpretation of the regulation adopted by ISBH, HEW and the District Court is not inconsistent with the legislation it implements. The entire point of 42 U. S. C. § 1320a-1 was to limit the capital expenditures for which reimbursement under Medicare/Medicaid was available. This purpose is clearly spelled out in the legislative history of the statute, a 1972 amendment to the Social Security Act.

Congress was concerned about the subsidization of construction of unnecessary hospital facilities by means of the capital depreciation formula for the determination of reimbursement for patient care under Medicare/Medicaid. Therefore, the statute in question was specifically enacted to monitor and limit unnecessary hospital construction. House Report (Ways and Means Committee) No. 92-231; 1973 U. S. C. C. A. A. N. 4989, 5004, 5065, 5288 (May 26, 1971); House Conference

Report No. 92-1605, 1972 U. S. C. C. A. A. N. 5380, 5383 (October 14, 1972).

In view of the underlying legislation, a literal interpretation of the regulation is absurd. If Lakeside's contention is correct, it means that no matter how many applications were submitted to a DPA enjoined from acting on them, they would *all* be automatically approved upon the expiration of their individual "time clocks". Thus the very proliferation of hospital facilities sought to be restricted would result from the application of a regulation supposedly designed to implement that legislative restriction. The literal interpretation of the regulation advocated by Lakeside is not merely inconsistent with the statute, it is diametrically opposed to the legislation which gave rise to the regulation.

It is equally clear that the interpretation of ISBH, HEW, and the District Court of the regulation being challenged is not "plainly erroneous."

General principles of statutory construction are applicable to the interpretation of administrative regulations. *Rucker* v. *Wabash R. R. Co.*, 518 F. 2d 146 (7th Cir. 1969). Thus, the regulation must be read as a whole in the context of the total legislation and the policies underlying it. *Philbrook* v. *Glodgett*, 421 U. S. 707 (1975); therefore, the regulation should not be read literally, for to do so would lead to an absurd result, one contrary to the purpose of the legislation as a whole. *Haggar Co.* v. *Helvering*, 308 U. S. 389 (1940; *Organized Migrants & Community Action, Inc.* v. *Brenner*, 520 F. 2d 1161 (D. C. Cir. 1975).

Application of these principles to the instant case leads to the inescapable conclusions that it is Lakeside's interpretation of the regulation that is clearly erroneous and that the interpretation of ISBH, HEW and the District Court must be approved.

If the regulation in issue *must* be construed strictly and literally, it is void and of no effect. An administrative regulation has the force of law if, and only if, it is not inconsistent

with or contrary to the purposes of the organic statute it is designed to effectuate. *Rosen* v. *United States*, 245 U. S. 467 (1918). As a literal interpretation of the regulation totally frustrates the legislative policy expressed in the underlying statute, it is simply void and of no effect. *Traders Nat'l Bank of Kansas City* v. *United States*, 148 F. Supp. 278 (W. D. Mo. 1956); *Smith* v. *Sutton*, 135 F. Supp. 805 (D. D. C. 1955).

The Secretary in its briefs before the District Court and the Circuit Court of Appeals and in the administration of the program has logically dealt with the appropriate interpretation of these Regulations. The interpretation grants all applicants for competing health facility needs a "reasonable period of time" within which to have their competing applications heard. The interpretation urged by Lakeside would require the Court to determine that, as among competing applicants the one that went first would lose its appeal right guaranteed by Section 1122. Such an interpretation of the Regulations as argued by the Petitioner is illogical, arbitrary and unreasonable. It was rejected by the Secretary, the Wells Circuit Court, ISBH and both Federal Courts and should not be given credence here.

C.

Petitioner's second due process argument fails for another reason. The fact that Lakeside was not a party to the lawsuit which gave rise to the injunction attacked by Petitioner is of no consequence. Assuming, *arguendo*, that Petitioner had a "right" to a determination on the merits of its application within 60 days after it was submitted, the injunction in question did not deprive it of that right without due process of law.

The results of litigation between two parties often has an effect upon third parties who are not directly involved in the lawsuit. However, it is neither the duty nor the responsibility of the litigating parties to protect the interests of non-participants. That responsibility rests with the one asserting an interest in the outcome of the dispute.

The Indiana Trial Rules specifically provide the mechanism for such a party to assert a claim in the outcome of a lawsuit between others. That mechanism is intervention. Trial Rule 24 provides that:

> "Upon timely motion anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to a property, fund or *transaction*, which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or *transaction*, unless the applicant's interest is adequately represented by existing parties." (Emphasis added.)

In the instant case, Lakeside had actual notice and was fully apprised of all developments in the state court action. It had every right to intervene in that action to insure that any rights it had relating to its application before the ISBH were not adversely affected by a decision of the court. It chose not to intervene.

Furthermore, after being advised by ISBH that any further action on its application was stayed by a court order, Petitioner made no effort to utilize HEW appeals procedures to obtain a modification of ISBH's position.

Both intervention and administrative appeal were available to Petitioner to protect its claimed rights in the application processing procedure. Neither of these methods of recourse were exercised, not because their use was denied Petitioner, but because Petitioner chose not to press its claim in the manner afforded by law.

Petitioner's "rights" in this matter were the constitutionally guaranteed rights to a hearing and to an appeal. Those rights were available to it in this case at the time the complained-of injunction was entered and thereafter. That neither intervention or appeal occurred is attributable solely to Petitioner's inaction. "Due process", by definition, refers to procedure, not result. In this case, what Petitioner is dissatisfied with is result, not procedure. Due process of law was available to Petitioner. Having failed to invoke that process, it may not now complain of the result it obtained, and its Petition for a Writ of Certiorari must be denied.

D.

Petitioner was actually benefitted, not harmed, by the delay in the administrative process caused by the injunction entered by the Wells Circuit Court.

The State Plan in existence at the time of Petitioner's application to the ISBH permitted only three hospitals in Fort Wayne, Indiana. Thus it was not possible for the application to ISBH for approval of construction of a fourth hospital to have been lawfully approved. Action at that time, by ISBH, could have resulted only in rejection of the application. Therefore, it was to Lakeside's advantage for a decision on its application to be delayed until such time as the existing State Plan could be amended—as it subsequently was. As the record indicates, ISBH after the amendment considered Petitioner's application on the merits, subsequent to amendment of the State Plan despite the fact that it was submitted (and would have been rejected, absent the injunction) at a time when it could not possibly have been approved.

E.

It should be noted Lakeside had an opportunity to be heard. It could, in fact, have been heard at any time within sixty days of the time of filing its application. It had an opportunity for a simultaneous hearing with Community. Any of these opportunities afforded Lakeside "a reasonable time within which to be heard" under Section 1122. It elected not to avail itself of any of these opportunities and acquiesced in the action by Community Hospital in advancing its application first. Community therefore had, under the Regulations, a right to be heard and to pursue a fair hearing and a judicial review afforded

under Section 100.106(c)(4). It is only a fair interpretation of the Regulations that when Community permitted the competing application for the same health care facility to proceed, that it waived its right to object to Community exhausting the remedies afforded it under the Regulations. A "reasonable time within which to be heard" with respect to the Lakeside application was, therefore, after Community had exhausted its remedies under Regulations Section 100.106(c)(4) when the "final decision of the Reviewing Court", the judgment of the Wells Circuit Court in this case entered on May 27, 1975, confirmed the "findings and recommendations of the Designated Planning Agency" with respect to Community then Lakeside again was entitled to be heard on its competing application within a reasonable time. Any other interpretation of the Regulations permits the intended purposes of Section 1122 to be frustrated by permitting the ISBH to permit the construction of one health care facility while permitting the "Reviewing Court" to simultaneously approve the construction of an identical health care facility.

The Court should note Lakeside was in no better position than the other three applicants with respect to the time clock issue. If Lakeside's application had been approved by "lapse of time" so had the competing applications of all three of the hospitals each of whom then had pending applications to absorb the entire bed requirement. In the event Lakeside's application and those of the three existing hospitals were likewise approved by lapse of time, and approximately 500 hospital beds have been authorized for construction in Fort Wayne in 1978 by reason of the approval of all applications then pending.

It is submitted, therefore, in the facts and circumstances of the present case, competing applicants are given a reasonable period of time within which to have a hearing under Section 1122 when steps are taken by the ISBH to hear competing applications simultaneously. When one of the competing applicants asks for delay it is not unreasonable that he be required to delay

until the initial applicant has exhausted the remedies afforded him by the Secretary under Regulations.

On July 9, 1975, the hearing on all competing proposals was taken under consideration and a full hearing had. Lakeside was present by its officers, but declined to respond to questions by the ISBH and submit additional requested data solicited by the ISBH. Following this full and fair hearing with respect to all of the completing applications, the ISBH made the following factual determination supporting its decision to recommend to the Secretary that the capital improvements proposed by Lakeside not be reimbursed:

> 7.) That the proposed capital expenditure is not economically feasible and cannot be accommodated in the patient charge structure of the health care facility without unreasonable increases.
>
> 8.) That the proposal will not foster cost containment or will not improve quality of care through improved efficiency and productivity, including promotion of cost effective factors such as ambulatory care, preventive health care services, home health care, and design and construction economics, or through increased competition between different health services delivery systems.

* * * * *

Lakeside chose not to appeal from this administrative adjudiction. It filed no objections to the findings of the ISBH, requested no "fair hearing" be accorded under regulations, and did not effect a "judicial review" of the administrative adjudication by the State Board.

The reason that administrative review was abandoned is obvious—Lakeside had no substantial expectation that either the fair hearing officer or the State Court could find that the capital expenditures proposed by Lakeside were "economically feasible" or would "foster cost containment". Lakeside tried, therefore, to win approval of its application without subjecting it to a complete review. The method selected was by collateral attack in the Federal Court. Lakeside has been unsuccessful in

both the District Court and the Circuit Court of Appeals. In the sense of all justice it should be unsuccessful here. Not only has minimal constitutional protection of fair play and substantial justice been afforded Lakeside in the facts and circumstances of the present case, but they have been given one full hearing and an opportunity for a second. They elected not to complete the final hearing because they knew they could not win. Should the Supreme Court now rule in Lakeside's favor unnecessary and completely duplicative health care facilities would be imposed upon Fort Wayne for which both the people of Fort Wayne and the public at large would be required to reimburse the petitioner. Such a result would clearly not be in the interest of "fair play and substantial justice" and would be a complete frustration of the efforts of Congress to assure:

> ". . . that federal funds appropriated under Title V, XVIII, and XIX are not used to support unnecessary capital expenditures." 42 U.S.C. Section 1320a-1

F.

It is inappropriate for this Court to even consider the merits of Petitioner's arguments in support of its Petition for a Writ of Certiorari. The relief sought by Petitioner should be denied for the additional reason that Petitioner has totally failed to exhaust its administrative remedies prior to initiating this action in the District Court.

It is well-established that a party claiming to be aggrieved by an action of an administrative agency may not seek redress for the alleged wrong from the courts prior to exhausting its administrative remedies. *See, e.g., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Although there are some limited exceptions to this rule, none are applicable to the facts in the case at bar. Petitioner itself has not even suggested the existence of any extraordinary facts which would bar application of this doctrine.

In this case, the ultimate relief sought by Lakeside is the approval of its application for approval of capital expenditures pursuant to the provisions of 42 U. S. C. § 3320a-1. An applicant dissatisfied with a DPA's initial decision on its application can, within 30 days of receipt of notice of the decision, request a hearng on its application. 42 U. S. C. § 1320a-1(f) provides that a final determination by the Secretary of HEW upon an application may be reconsidered at the request of an applicant at any time within six months of that determination.

Petitioner therefore was provided by statute with three separate opportunities to obtain from an administrative agency the relief sought by its lawsuit. However, Petitioner filed this lawsuit even before it had received an initial determination on the merits as to its application. Thus, not only did Lakeside not exhaust its administrative remedies before filing suit, it did not even await completion of the *first stage* of the administrative process. In fact, it refused to even participate in the hearing on its application held upon ISBH's own motion.

Therefore, for the additional reason that Lakeside has failed to exhaust its administrative remedies with respect to the issues that it raises with this Court, the decision of the Court of Appeals should be affirmed and the Petition for a Writ of Certiorari should be denied.

CONCLUSION.

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

ATTACHMENT 1.

Limitation on Federal Participation for Capital Expenditures.

Sec. 1122. (a) The purpose of this section is to assure that Federal funds appropriate under the title V, XVIII, and XIX are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any of such titles and that, to the extent possible, reimbursement under such titles shall support planning activities with respect to health services and facilities in the various States.

(b) The Secretary, after consultation with the Governor (or other chief executive officer) and with appropriate local public officials, shall make and agreement with any State which is able and willing to do so under which a designated planning agency (which shall be an agency described in clause (ii) of subsection (d)(1)(B) that has a governing body or advisory board at least half of whose members represent consumer interests) will—

(1) make, and submit to the Secretary together with such supporting materials as he may find necessary, findings and recommendations with respect to capital expenditures proposed by or on behalf of any health care facility or health maintenance organization in such State within the field of its responsibilities.

(2) receive from other agencies described in clause (ii) of subsection (d)(1)(B), and submit to the Secretary together with such supporting material as he may find necessary, the findings and recommendations of such other agencies with respect to capital expenditures proposed by or on behalf of health care facilities or health maintenance organizations in such State within the fields of their respective responsibilities, and

(3) establish and maintain procedures pursuant to which a person proposing any such capital expenditure may appeal a recommendation by the designated agency and will be granted an opportunity for a fair hearing by such agency or person other than the designated agency as the Governor (or other chief executive officer) may designate to hold such hearings,

whenever and to the extent that the findings of such designated agency or any such other agency indicate that any such expenditure is not consistent with the standards, criteria, or plans developed pursuant to the Public Health Service Act (or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963) to meet the need for adequate health care facilities in the area covered by the plan or plans so developed.

(c) The Secretary shall pay any such State from the Federal Hospital Insurance Trust Fund, in advance or by way of reimbursement as may be provided in the agreement with it (and may make adjustments in such payments on account of overpayments or underpayments previously made), for the reasonable cost of performing the functions specified in subsection (b).

(d)(1) Except as provided in paragraph (2), if the Secretary determines that—

(A) neither the planning agency designated in the agreement described in subsection (b) nor an agency described in clause (ii) of subparagraph (B) of this paragraph had been given notice of any proposed capital expenditure (in accordance with such procedure or in such detail as may be required by such agency) at least 60 days prior to obligation for such expenditure; or

(B)(i) the planning agency so designated or an agency so described had received such timely notice of the intention to make such capital expenditure and had, within a reasonable period after receiving such notice and prior to obligation for such expenditure, notified the person proposing such expend-

iture would not be in conformity with the standards, criteria, or plans developed by such agency or any other agency described in clause (ii) for adequate health care facilities in such State or in the area for which such other agency has responsibility, and

(ii) the planning agency so designated had, prior to submitting to the Secretary the findings referred to in subsection (b)—

(I) consulted with, and taken into consideration the findings and recommendations of, the State planning agencies established pursuant to section 314(a) and 604(a) of the Public Health Service Act (to the extent that either such agency is not the agency so designated) as well as the public or nonprofit private agency or organization responsible for the comprehensive regional, metropolitan area, or other local area plan or plans referred to in section 314(b) of the Public Health Service Act and covering the area in which the health care facility or health maintenance organization proposing such capital expenditure is located (where such agency is not the agency designated in the agreement), or, if there is no such agency, such other public or nonprofit private agency or organization (if any) as performs, as determined in accordance with criteria included in regulations, similar functions, and

(II) granted to the person proposing such capital expenditure an opportunity for a fair hearing with respect to such findings;

then, for such period as he finds necessary in any case to effectuate the purpose of this section, he shall, in determining the Federal payments to be made under titles, V, XVIII, and XIX with respect to services furnished in the health care facility for which such capital expenditure is made, not include any amount which is attributable to depreciation, interest on borrowed funds, a return on equity capital (in the case of proprietary facilities), or other expenses related to such capital expenditure. With respect to any organization which is reimbursed on a per capita or a fixed fee or negotiated rate basis, in determining the Federal payments to be made under titles V, XVIII, and XIX, the Sec-

retary shall exclude an amount which in his judgment is a reasonable equivalent to the amount which would otherwise be excluded under this subsection if payment were to be made on other than a per capita or a fixed fee or negotiated rate basis.

(2) If the Secretary, after submitting the matters involved to the advisory council established or designated under subsection (i), determines that an exclusion of expenses related to any capital expenditure of any health care facility or health maintenance organization would discourage the operation or expansion of such facility or organization, or of any facility of such organization, which has demonstrated to his satisfaction proof of capability to provide comprehensive health care services (including institutional services) efficiently, effectively, and economically, or would otherwise be inconsistent with the effective organization and delivery of health services or the effective administration of title V, XVIII, or XIX, he shall not exclude such expenses pursuant to paragraph (1).

(e) Where a person obtains under lease or comparable arrangement any facility or part thereof, or equipment for a facility, which would have been subject to an exclusion under subsection (d) if the person had acquired it by purchase, the Secretary shall (1) in computing such person's rental expense in determining the Federal payments to be made under titles V, XVIII, and XIX with respect to services furnished in such facility, deduct the amount which in his judgment is a reasonable equivalent of the amount that would have been excluded if the person had acquired such facility or such equipment by purchase, and (2) in computing such person's return on equity capital deduct any amount deposited under the terms of the lease or comparable arrangement.

(f) Any person dissatisfied with a determination by the Secretary under this section may within six months following notification of such determination request the Secretary to reconsider such determination. A determination by the Secretary under this section shall not be subject to administrative or judicial review.

(g) For the purpose of this section, a "capital expenditure" is an expenditure which, under generally accepted acounting principles, is not properly chargeable as an expense of operation and maintenance and which (1) exceeds $100,000, (2) changes the bed capacity of the facility with respect to which such expenditure is made, or (3) substantially changes the services of the facility with respect to which such expenditure is made. For purposes of clause (1) of the preceding sentence, the cost of the studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the acquisition, improvement, expansion, or replacement of the plant and equipment with respect to which such expenditure is made shall be included in determining whether such expenditure exceeds $100,000.

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ATTACHMENT 2.

PART 100—COST CONTAINMENT AND QUALITY CONTROL.

Subpart A—Limitation on Federal Participation for Capital Expenditures.

§ 100.101 Applicability.

The provisions of this subpart are applicable to agreements entered into by the Secretary with the various States pursuant to section 1122 of the Social Security Act (42 U. S. C. Chap. 7), and to determinations made by the Secretary thereunder, for the purpose of assuring that Federal funds appropriated under titles V, XVIII, and XIX of the Social Security Act are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any of such titles and that, to the extent possible, reimbursement under such titles shall support planning activities with respect to health services and facilities in the various States.

* * * * *

§ 100.106 Agreement; procedures for agency review.

(a) The Agreement shall provide for the following notification and review procedures:

(1) The designated planning agency shall establish, maintain, and disseminate to all health care facilities and health maintenance organizations within the State procedures under which timely written notice of the intention to make a capital expenditure subject to this subpart is required to be given (i) to the designated planning agency, in which case such agency shall distribute copies of such notice to those other agencies described in § 100.105 whose respective fields of responsibility cover the proposed expenditure, or (ii) simultaneously to the designated

planning agency and to those other agencies described in § 100.105 whose respective fields of responsibility cover the proposed expenditure. Such notice shall set forth the date on which the obligation is expected to be incurred, and must be received by the designated planning agency not less than 60 days prior to such date.

(2) Such notice shall be submitted in such form and manner and shall contain such information as may be required by the designated planning agency to meet the needs of all the agencies whose respective fields of responsibility cover the proposed expenditure. The designated planning agency shall promptly publicize its receipt of such notice through local newspapers and public information channels.

(3) If the notice under this paragraph is found by the designated planning agency to be incomplete, such agency shall notify the person proposing the capital expenditure within 15 days of its receipt of such incomplete notice, advising such person of the additional information required. Where such timely notification of incompleteness is provided, the period within which the agency is required to notify the person proposing such expenditure that such expenditure is not approved, as required by section 1122(d)(1)(B)(i) of the Act and paragraph (a)(4) of this section, shall run from the date of receipt by the agency of a notice containing additional information.

(4) Except as provided in paragraph (a)(3) of this section, the designated planning agency shall, prior to the date set out in the written notice of intention submitted pursuant to paragraph (a)(1) of this section as the expected date for the obligation of the proposed expenditure (but, subject to the provisions of paragraph (a)(3) of this section in no event later than 90 days after the receipt of such notice unless the person proposing the capital expenditures agrees to a longer period), provided written notification to the person proposing such capital expenditure (i) that such capital expenditure has been determined by such agency to be in conformity with the standards, criteria and plans described in § 100.104(a)(2); or (ii)

that such agency has elected not to review the proposed capital expenditure (which election shall be equivalent to a determination by such agency that such expenditure is in conformity with such standards, criteria and plans), in which event the designated planning agency shall notify the Secretary of its reasons for electing not to review the proposed capital expenditure; or (iii) that such agency after having consulted with, and taken into consideration the findings and recommendations of, the other agencies described in § 100.105 (to the extent that such proposed capital expenditure is within the respective fields of responsibility of such other agencies), has determined that the proposed capital expenditure would not be in conformity with the standards, criteria, or plans described in § 100.104(a)(2). The failure of the designated planning agency to provide any such notification within the time limitations set forth above shall have the effect of a determination described in paragraph (a)(4)(i) of this section. The notification described in paragraph (a)(4)(iii) of this section shall be accompanied by a statement of the designated planning agency's proposed recommendation to the Secretary and the reasons therefor, a summary of the findings and recommendations of the other agencies with which such agency has consulted pursuant to paragraph (a)(4)(iii) of this section and shall provide an opportunity for a fair hearing with respect to the findings and recommendations of the designated planning agency at the request of the person proposing such capital expenditure.

(5) Copies of the findings and recommendations of the designated planning agency shall also be sent to the other agencies consulted, and shall be publicized through local newspapers and public information channels.

(b) Any person proposing a capital expenditure may withdraw his preciously filed notice or proposed capital expenditure, without prejudice, by filing simultaneous written notification of such withdrawal with these agencies to which he gave notification pursuant to paragraph (a)(1) of this section, at any time prior

to his receipt of notice pursuant to paragraph (a)(4)(i), (ii), or (iii) of this section.

(c) In addition to any other hearing which may be provided by an agency described in § 100.105 in connection with the review of a proposed capital expenditure under this subpart, the Agreement shall provide that the designated planning agency will grant to a person proposing a capital expenditure an opportunity for a fair hearing with respect to the findnigs and recommendations of the designated planning agency, and will establish and maintain procedures for such appeal. Such procedures shall include the following:

(1) The request for a hearing must be made in writing, to the designated planning agency, within 30 days after the date on which the person proposing the capital expenditure receives notice of an adverse finding or recommendation of the designated planning agency.

(2) The hearing shall be commenced within 30 days after receipt of the request described in paragraph (c)(1) of this section (or later, at the option of the person requesting the hearing), and shall be conducted in accordance with the applicable requirements of State law and by such agency or person, other than the designated planning agency, as the Governor (or other chief executive officer of the State) may designate for that purpose: *Provided*, That no agency which or person who has taken part in any prior consideration of or action upon the proposed capital expenditure may conduct such hearing.

(i) The hearing shall be open to the public and shall be publicized through local newspapers and public information channels.

(ii) The person proposing the capital expenditure, the other agencies described in § 100.105, and other interested parties, including representatives of consumers of health services, shall be permitted to give testimony and present arguments at the hearing.

(iii) A record of the proceedings shall be kept in accordance with the requirements of applicable State law and copies of such record together with copies of all documents received in evidence, shall be available to the public for inspection and copying: *Provided*, That any person who requests copies of such material may be required to bear the costs thereof.

(3) As soon as practicable, but not more than 45 days after the conclusion of a hearing, the hearing officer shall notify the person who requested the hearing, the designated planning agency, the other agencies described in § 100.105 who participated in the hearing, and other interested parties at the discretion of the hearing officer, of his decision and the reasons therefor. Such decision shall be publicized through local newspapers and public information channels. In the event that the hearing officer fails to provide notice as required above within 45 days after the conclusion of a hearing, such failure to provide notice shall have the effect of a finding that the proposed capital expenditure is in conformity with the standards, criteria, and plans described in § 100.104(a)(2).

(4) Any decision of a hearing officer, arrived at in accordance with this paragraph, shall, to the extent that it reverses or revises the findings or recommendations of the designated planning agency, supersede the findings and recommendations of the designated planning agency: *Provided*, That where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency.

(5) To the extent that any decision of a hearing officer pursuant to this paragraph requires that the designated planning agency take further action, such action shall be completed by such date as the hearing officer may specify. Failure by the designated planning agency to complete such action by such date shall have the effect of a finding that the proposed capital expenditure is in conformity with the standards, criteria, and plans described in § 100.104(a)(2).

ATTACHMENT 3.

DPA MANUAL.

GUIDANCE AND PROCEDURES FOR DESIGNATED PLANNING AGENCIES IN ADMINISTERING SECTION 1122 OF THE SOCIAL SECURITY ACT.

• • •

March, 1974

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VI. FAIR HEARING UNDER SECTION 1122 AND STATE ACTION.

a. *Fair Hearing at State Level Under Section 1122.*

The DPA's notice to a proponent on whose proposal it has made a negative finding and recommendation must include the information that he has the right to a fair hearing concerning the basic facts encompassed in the initial application review. Individual notifications are necessary, and should be sent to the proponent no more then 5 days after a negative finding is arrived at by the DPA. If the proponent wishes to appeal, he must respond to the DPA *in writing* not more than 30 days after the date of such notification, requesting a fair hearing on his case, or he forfeits his right to a fair hearing. The hearing must begin within 30 days after receipt of the request (or later, at the option of the proponent). If a fair hearing is requested the DPA should issue a press release describing the proposal and telling the time and place of the hearing.

b. *Substance of Fair Hearing Under Section 1122.*

The primary purpose of the fair hearing process is for the hearing officer to determine whether the proposed expenditure

is consistent with the standards, criteria, and plans specified in the statute. The correctness, adequacy, or appropriateness of the standards, criteria, and plans against which the proposed expenditure was measured are *not* matters for consideration at the hearing. The question of the DPA's adherence to its procedures, as outlined in the Regulations and the Agreement, may be considered. The applicant may also introduce evidence and argument on the issue of whether the exclusion of expenses related to the proposed expenditure would discourage the operation or expansion of the facility or organization, or would otherwise be inconsistent with the effective organization and delivery of health services or the effective admainistration of Titles V, XVIII, and XIX.

The question of whether a proposed expenditure is subject to review under Section 1122 will not, in light of the appeal to DHEW available to the proponent (see paragraph *d*, chapter V), be a question in the fair hearing.

The hearing officer may submit his own finding as to whether the proposed expenditure is consistent with the applicable standards, criteria, and plans, and in the case of a negative finding, his recommendation as to whether or not the Secretary should exclude from reimbursement expenses related to the proposed expenditure. The hearing officer may direct that the DPA take further action on the proposed expenditure. The hearing officer may also reach such supplementary conclusion (e.g. on the question of adherence to procedural requirements) and submit such further recommendations as he deems appropriate.

c. *Hearing Officer.*

The designation of hearing officers is made by the Governor, not the DPA. In most States it will be done through the State agency which usually selects hearing examiners. A hearing officer must have no oficial assignment or tie to the 314(a), 604(a) or other State agency playing a direct role in the review. He may be designated by the Governor on a periodic basis, specifically

to serve at Section 1122 fair hearings, or he may be selected by lot, subject to his availability, from a roster of qualified hearing officers assembled in accordance with State requirements governing the selection of impartial examiners to assist the State in other areas.

d. *Hearing Record.*

The official record of hearings is to be kept in accordance with the requirements of applicable State law. The State will furnish copies of the record to the person requesting the hearing, but in furnishing copies to others may require them to pay the cost of them. The official hearing file will be retained at State level, in such form as the State specifies, with a summary of the determination by the hearing officer forwarded to the regional office (See Flow Chart, Appendix 4).

e. *Hearing Decisions and Notifications.*

The hearing officer must reach a decision and give notice of it not more than 45 days after the conclusion of the hearing; failure to do so has the effect of a positive finding. The hearing officer will notify the proponent who requested the hearing, the DPA and other health planning agencies, and such other parties as he feels have an immediate interest. The notice will include the decision, the reason for it, and, if appropriate, the corrective steps needed.

To the extent that the hearing officer's decision requires further action by the DPA, such action must be completed by the date he specifies. Failure to complete the action by the date specified has the effect of a positive finding.

Receipt of this notice will indicate the next steps for the DPA. One of these will be notifying the general public through the procedure described in paragraph *h*, of Chapter V, page 12, above.

f. State Appeals Processes.

Many States have appeals processes established for reviewing decisions on health projects, license issuance or revocation, certification for life safety factors, etc. The Section 1122 fair hearing process does not modify or replace any of these. The fact that a proponent has requested and received a fair hearing under Section 1122 does not prejudice the availability of such other judicial or administrative mechanisms as may exist for his use under State law or regulation.

ATTACHMENT 4.

4-22-1-1 Purpose

Sec. 1. It is the intent to establish a uniform method of administrative adjudication by all agencies of the state of Indiana, to provide for due notice and an opportunity to be heard and present evidence before such agency and to establish a uniform method of court review of all such administrative adjudication.

4-22-1-2 Definitions

Sec. 2. The word "agency" whenever used in this act shall mean and include any officer, board, commission, department, division, bureau or committee of the state of Indiana other than courts, the governor, military officers or military boards of the state, state colleges or universities supported in whole or part by state funds, benevolent, reformatory or penal institutions, the industrial board, state board of tax commissioners and the public service commission of Indiana: Provided, however, That on and after the first day of April 1951, the above entitled act shall not apply to, control nor affect the Indiana department of state revenue or any division, department, or agency thereunder. With respect to any matters involving taxpayers' objections either to the assessment of tax, and/or penalties and interest thereon, or the denial of a claim for refund of the same, which may be or may have been imposed by any act under the administrative jurisdiction of the said Indiana department of state revenue in which matters of adjudication under the provisions of this act has been requested but in which no final determination has been made by the adjudicating agency, the taxpayer may, on or before May 1, 1951, file a petition with the circuit or superior court of the county in which he resides or in the circuit or superior court

of Marion County for the transfer thereto of any such matter, together with his complaint and shall serve summons upon the department as required by law. Any such court with which such petition for transfer and complaint is filed is hereby vested with jurisdiction thereof and upon the filing of the petition and complaint shall require an answer thereto by the adverse party. Upon the closing of the issues, the court shall set the matter for hearing and conduct a hearing on said petition and complaint, take testimony, examine the evidence in the matter de novo, determine whether the action of the department complained of was erroneous, and make an appropriate order or decree which shall be subject to appeal in the same manner as in other civil cases. If such petition for transfer is not filed on or before the first day of May, 1951, all hearing procedure in matters theretofore pending adjudication under the provisions of the above entitled act shall be considered nullified and thereafter such hearing procedure shall be governed by the provisions of the particular tax act involved as to protests, objections, hearings, findings, payment of tax or license fees and suit for refund thereof.

The provisions of the above entitled act having been supplementary to the procedures in the revenue acts administered by the Indiana department of state revenue and its component divisions, it is hereby expressly provided that the procedures specified in said revenue acts shall continue to remain in full force and effect.

The word "person" whenever used in this act shall mean and include any person, firm, association, partnership or corporation. It shall also include municipalities and all political subdivisions of government against which any agency may make an order or determination.

"Administrative adjudication" means the administrative investigation, hearing and determination of any agency of issues or cases applicable to particular persons, excluding, however, the adoption of rules and regulations; the issuance of warrants or

jeopardy warrants for the collection of taxes or employment security contributions; the payment of benefits by the employment security division; the review by the state board of tax commissioners of budgets, appropriations, tax levies and bond issues; determination of eligibility and need for public assistance under the welfare laws; mathematical calculations for the purpose of classification of townships by the state board of accounts; orders and prescribed procedure relating to the administration or supervision of the administration of public assistance under the welfare laws; determinations which affect only other agencies; determinations by the Indiana alcoholic beverage commission other than determinations to which this act is specifically made applicable by any other law; and the dismissal or discharge of an officer or employee by a superior officer, but including hearings on discharge or dismissal of an officer or employee for cause where the law authorizes or directs such hearing.

* * * * *

4-22-1-14 Petition for review

Sec. 14. Any party or person aggrieved by an order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act. Such review may be had by filing with the circuit or superior court of the county in which such person resides, or in any county in which such order or determination is to be carried out or enforced, a verified petition setting out such order, decision or determination so made by said agency, and alleging specifically wherein said order, decision or determination is:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or

(2) Contrary to constitutional right, power, privilege or immunity; or

(3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or

(4) Without observance of procedure required by law; or

(5) Unsupported by substantial evidence.

Said petition for review shall be filed within fifteen (15) days after receipt of notice that such order, decision or determination is made by any such agency. Notice shall be given in the manner prescribed by section 6 of this act. Unless a proceeding for review is commenced by so filing such petition within fifteen (15) days any and all rights of judicial review and all rights of recourse to the courts shall terminate.

* * * * *

4-22-1-16 Judicial review

Sec. 16. On the filing of a verified petition for such judicial review, said cause shall be docketed by the clerk of said court in the name of the petitioner or petitioners against such agency and all other parties to the petition. The issues shall be deemed closed by denial of all matters at issue without the necessity of filing any further pleadings. Changes of venue from the judge and from the county shall be granted either party under the law now governing, or which may hereafter govern changes of venue in civil causes.

4-22-1-17 Petition for judicial review; stay of action pending review

Sec. 17. Where a petition for judicial review is filed as provided in this act in a matter other than an assessment or determination of tax due or claimed to be due the state, and where the law concerning the agency whose order or determination is being reviewed does not preclude a stay of such order by the court, the person seeking such review may seek such action by filing a verified petition for an order of court staying the action of the agency pending decision by the court. If the court in which said petition is filed, or the judge thereof in vacation, finds that said petition for review and said petition for a stay

order show a reasonable probability that the order of determination appealed from is invalid or illegal, said court or the judge thereof may enter an order staying the order or determination pending final decision of the court on said review, upon the filing of bond conditioned upon the due prosecution of said proceeding for review and that the petitioner will pay all court costs and abide by the order or determination of the agency in question if it is not set aside. Said bond shall be in such amount and with surety to the approval of the court but the penal sum shall not be less than five hundred dollars ($500).

Where the determination of the agency is a revocation or suspension of a license and the law governing the agency permits a staying of the action of the agency by court order pending judicial review, any stay so ordered shall be effective during the period of review and any appeal therefrom and until finally determined, unless otherwise ordered by the court in which such review or appeal therefrom is pending. If the stay is granted as herein provided and the determination of the agency approved on final determination, the revocation or suspension of the license shall then immediately become effective.

4-22-1-18 Judicial review upon the record

Sec. 18. On such judicial review such court shall not try or determine said cause de novo, but the facts shall be considered and determined exclusively upon the record filed with said court pursuant to this act.

On such judicial review if the agency has complied with the procedural requirements of this act, and its finding, decision or determination is supported by substantial, reliable and probative evidence, such agency's finding, decision or determination shall not be set aside or disturbed.

If such court finds such finding, decision or determination of such agency is:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or

(2) Contrary to constitutional right, power, privilege or immunity; or

(3) In excess of statutory jurisdiction, authority or limitations, or short or statutory right; or

(4) Without observance of procedure required by law; or

(5) Unsupported by substantial evidence, the court may order the decision or determination of the agency set aside. The court may remand the case to the agency for further proceedings and may compel agency action unlawfully withheld or unreasonably delayed.

Said court in affirming or setting aside the decision or determination of the agency shall enter its written findings of facts, which may be informal but which shall encompass the relevant facts shown by the record, and enter of record its written decision and order or judgment.

ATTACHMENT 5.

STATE OF INDIANA } ss:
COUNTY OF ALLEN }

IN THE MATTER OF COMMUNITY HOSPITAL OF FORT WAYNE, INC., COMMUNITY HOSPITAL OF FORT WAYNE, INC., *Plaintiff,* *vs.* INDIANA STATE BOARD OF HEALTH, et al., *Defendants.*	In the Wells Circuit Court. Cause No. 25672.

ORDER

The Motion to Dissolve the Preliminary Injunction filed by the Defendant St. Joseph Hospital of Fort Wayne, Inc., is granted and the preliminary injunction heretofore entered is dissolved except that the Indiana State Board of Health (ISBH) shall take no action on the pending application of Lakeside Mercy Hospital, Inc., until such time as the proposals of the three Fort Wayne hospitals to provide substantially the same health care facilities have been acted upon by Indiana Region 3, Comprehensive Health Planning Council and transmitted to the ISBH so as to permit simultaneous consideration with the application of Lakeside Mercy Hospital, Inc.

/s/ JOSEPH E. EICHHORN
Judge, Wells Circuit Court

Dated: May 27, 1975

STATE OF INDIANA } ss:
COUNTY OF ALLEN }

IN THE MATTER OF COMMUNITY HOSPITAL OF FORT WAYNE, INC., COMMUNITY HOSPITAL OF FORT WAYNE, INC.,
Plaintiff.

vs.

INDIANA STATE BOARD OF HEALTH, et al.,
Defendants.

In the Wells Circuit Court.
Cause No. 25672.

FINDINGS AND ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

Comes now the Court and makes the following Findings of Fact and Conclusions of Law on the Plaintiff's Motion for Partial Summary Judgment.

FINDINGS OF FACT

1. The Court hereby incorporates by reference and adopts as its own the Findings of Fact entered on September 19, 1974, by Richard W. Guthrie, Hearing Officer, as a result of the hearing held on August 6, 1974, under Cause No. L-7, which Findings of Fact are incorporated herein the same as if they were restated in their entirety.

2. The Findings of Fact and Conclusions of Law of the Hearing Examiner revise the Findings of the Indiana State Board of Health (ISBH) and constitute a final order or determination made by an agency entitled to Judicial Review under the provisions of the Administrative Adjudication and Court Review Act. (I. C. 4-22-1, *et seq.*)

3. This action, commenced on October 4, 1974, by the filing of a complaint by the Plaintiff entitled "Verified Petition for Judicial Review of Adverse Determination of Indiana State Board of Health", asks for a Court review of the administrative determination of ISBH, and asks, among other various prayers for relief, for review of the Administrative Order and Determination of ISBH made July 3, 1974, receipt of which was acknowledged by the Plaintiff on July 5, 1974.

4. The Court has no jurisdiction to review the determination of ISBH made on July 3, 1974, and received by the Plaintiff on July 5, 1974, in that:

(a) the order of determination by ISBH is not a final order or determination made by the ultimate authority of such agency as required by I. S. 4-22-1-11, as a prerequisite for Judicial Review;

(b) the Plaintiff has not filed a Verified Petition for a review of such order of determination within fifteen (15) days of the date of the receipt of the notice of such determination by the Plaintiff on July 5, 1974, as is required by I. C. 4-22-1-14 as a prerequisite for Judicial Review; and

(c) the Plaintiff has not filed a certified transcript of the proceedings before the ISBH within fifteen (15) days after the filing of such Verified Petition for Review as required by I. C. 4-22-1-14 as a prerequisite for such review.

5. This Court has no jurisdiction to review the order or determination of the Hearing Examiner made on September 15, 1974, made pursuant to the provisions of Regulation Section 100.105(c)(4) of the Regulations of the Secretary of the Department of Health, Education and Welfare, in that:

(a) the order of determination of the Hearing Examiner is not a final order of determination made by the ultimate authority of such agency in that said order or determination

constitutes only a recommendation to the Secretary of Health, Education and Welfare under 42 U. S. C. A.(a)-1 and does not constitute a final decision by the ultimate authority of such agency as required by I. C. 4-22-1-11 as a prerequisite for Judicial Review.

(b) the Plaintiff has not filed a Verified Petition for Review of such determination within fifteen (15) days after the date of the receipt of the notice of the determination of the Hearing Examiner and has not asked the Court to review the determination of the Hearing Examiner as is required by I. C. 4-22-1-14 as a prerequisite for such review.

(c) the Plaintiff has not requested a determination or review of the final decision of such Hearing Examiner.

6. The decision of the Hearing Examiner revises the Findings and Determinations of ISBH but it does not reverse the decision of ISBH and constitutes a determination subject to review under Regulations Sec. 100.104(c) *et seq.* of the Regulations of the Secretary of Health, Education and Welfare.

7. The Order, Decision and Determination made by the Hearing Examiner is not:

(a) arbitrary, capricious, or in abuse of discretion, or not otherwise in accordance with law, nor

(b) contrary to any constitutional right, power, privilege or immunity, nor

(c) in excess of statutory jurisdiction, authority or limitations, or short of statutory rights; nor

(d) without observation of procedure required by law, nor

(e) unsupported by substantial evidence.

Conclusions of Law.

Based on the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

1. The State Hill-Burton Plan was developed pursuant to the Public Health Service Act pursuant to the authority given to Defendants in IC 1971, 16-2-1 *et seq.*

2. The Defendants' interpretation of the State Hill-Burton Plan, as providing no new general hospital construction in the Fort Wayne area, is not arbitrary or capricious.

3. Pursuant to Section 1122(b) of the Social Security Act, the Defendants must find that the applicant's proposal is consistent with the State Hill-Burton Plan in order to recommend to the Secretary of the United States Department of Health, Education and Welfare that the applicant receive a capital expenditure reimbursement pursuant to the provisions of Section 1122.

4. The Application No. 2 of Plaintiff is not consistent with the State Hill-Burton Plan.

5. The Defendant must recommend pursuant to the provisions of Section 1122 that Plaintiff not receive a capital expenditure reimbursement under the Medicaid, Medicare and Maternal and Child Health programs.

6. The Defendants in creating and administering the Hill-Burton Plan pursuant to the provisions of Section 1122 are acting in their governmental capacity pursuant to IC 1971, 16-2-1, *et seq.*

7. The Defendants are not estopped to apply the requirements of the State Hill-Burton Plan to Application Number 2 of Plaintiff.

8. Pursuant to 42 C. F. R. 100.106(a)(4)(iii) the Defendants are required to consider the recommendations of the local agency (Region 3 Comprehensive Health Planning Council) before making their own recommendations.

9. Defendants' actions in not rendering an opinion on the propriety of Plaintiff's Application No. 2 until after the hearing by the local agency was consistent with the law.

10. In so doing Defendants did not violate the information and coordination requirements contained in the DPA manual at pages 6, 11 and 14.

11. There is substantial evidence in the record to support a finding that the Plaintiff has not demonstrated proof of a capability to provide comprehensive health care services efficiently, effectively and economically so that it should come within the exception described in 42 C. F. R. 100.104(b)(2).

/s/ JOSEPH E. EICHHORN
Judge, Wells Circuit Court

Dated: May 27, 1975

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC.,

Petitioner,

vs.

INDIANA STATE BOARD OF HEALTH, STATE OF INDIANA; CASPER W. WEINBERGER; SECRETARY OF HEALTH, EDUCATION AND WELFARE; PARKVIEW MEMORIAL HOSPITAL, INC.; THE LUTHERAN HOSPITAL, INC.; ST. JOSEPH'S HOSPITAL OF FORT WAYNE, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The question presented in this cause can be succinctly stated as whether a state court involved in a state review of an application made pursuant to Section 1122 of the Social Security Act (42 U.S.C. § 1320 a-1) has jurisdiction to enjoin a state agency from considering any other proposals which would meet the same health needs as the proposal under review by the state court.

STATEMENT OF THE CASE

As stated in the opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, reported at 421 F.Supp. 193 and contained in the Petitioner's Appendix, the Indiana State Board of Health (hereinafter ISBH) had in 1973 and 1974 received five competing applications from various groups to fill a hospital bed need of 172 in the Fort Wayne, Indiana area. The first of these applications to complete the review process established by Section 1122 of the Social Security Act was that of Community Hospital of Fort Wayne, Inc. (hereinafter Community Hospital), a proposal to construct a new hospital. This application was disapproved by the ISBH on July 5, 1974 because the State Plan only contemplated expansion by an existing hospital. Subsequently, Community Hospital requested a "fair hearing" pursuant to 42 C.F.R. § 100.106(c), a portion of the implementing regulations under Section 1122. Upon receiving an unfavorable decision from the hearing officer, Community Hospital pursuant to 42 C.F.R. § 100.106(c)(4) filed a petition for judicial review of this decision in the Circuit Court of Allen County, Indiana. Community Hospital then faced the situation where the ISBH would be processing the other four proposals which sought to meet the same bed need as Community Hospital, as the ISBH was required to do under the time constraints imposed by the regulations, thus in actuality rendering moot any subsequent decision by the court. Therefore, Community Hospital sought, and was granted, the temporary restraining order of November 12, 1974, which was followed by the orders of December 9, 1974, December 31, 1974, and May 27, 1975 which enjoined the ISBH from considering any other proposals which would meet the same bed needs as the Community Hospital application.

ARGUMENT

The crux of the position of Lakeside Mercy Hospital, Inc. (hereinafter Lakeside) in its Petition is to question whether the restraining orders issued by the state courts tolled the running of the "time clocks" as established by the federal regulations, and to assert that this is a "significant question" which inevitably must be decided by the Supreme Court of the United States. However, a practical analysis of this case will reveal that the opinion of the federal district court, as affirmed by the Court of Appeals for the Seventh Circuit, is the only rational outcome possible for this cause.

First, it is apparent that in promulgating the federal regulations which are applicable to a Section 1122 review the Secretary of Health, Education, and Welfare contemplated the participation of state courts in the state review process. 42 C.F.R. § 100.106(c)(4) states:

> Any decision of a hearing officer, arrived at in accordance with this paragraph, shall, to the extent that it reverses or revises the findings or recommendations of the designated planning agency, supersede the findings and recommendations of the designated planning agency: *Provided, That where judicial review of such decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency.* (Emphasis added)

This concept of "judicial review" is expanded upon by the Secretary in the DPA Manual—"Guidance and Procedures for Designated Planning Agencies in Administering Section 1122 of the Social Security Act" which was pub-

lished in March, 1974. Section VI(f) of said Manual states:

> *State Appeals Processes*
>
> Many states have appeals processes extablished for reviewing decisions on health projects, license issuance or revocation, certification for life safety factors, etc. The Section 1122 fair hearing process does not modify or replace any of these. The fact that a proponent has requested and received a fair hearing under Section 1122 does not prejudice the availability of such other judicial or administrative mechanisms as may exist for his use under State law or regulation.

In Indiana the vehicle for such judicial review by a state court of an administrative determination is the Administrative Adjudication Act, Indiana Code Section 4-22-1 et seq. This was the statute cited by Community Hospital in the Petition for Review filed with the Allen Circuit Court.

Second, it is axiomatic that if a state court is to conduct a meaningful review of a state review process, said court must have the inherent power to prevent that review from being rendered moot by an action of the very state agency whose decision the court is reviewing. Since pursuant to 42 C.F.R. § 100.106(a)(4) the failure of the ISBH to complete review of the four applications competing with Community Hospital within the prescribed periods would have the effect of a positive finding on all of said applications, the state courts were compelled to issue restraining orders against the ISBH which in effect stopped the time clocks for all competing proposals until the state court's review was completed.

Thirdly, the Secretary of Health, Education and Welfare, who promuglated the regulations which Lakeside seeks an interpretation of and who has been named a defendant in this cause, is in complete agreement with the analysis set forth above. It is certainly well-settled by deci-

sions of this Court that deference should be accorded to the Secretary's interpretation.

Therefore, the Indiana State Board of Health asserts that the Allen Circuit Court and the Wells Circuit Court had jurisdiction over the subject matter presented by the Community Hospital suit and the necessary jurisdiction over the Indiana State Board of Health to enjoin that agency from considering any other proposals which would meet the same bed needs as the Community Hospital application, pending the judicial review.

CONCLUSION

WHEREFORE, the Indiana State Board of Health respectfully submits that since Lakeside has failed to state a question which must inevitably be decided by this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 76-1482

In the Supreme Court of the United States

OCTOBER TERM, 1977

LAKESIDE MERCY HOSPITAL, INC., PETITIONER

v.

INDIANA STATE BOARD OF HEALTH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC., PETITIONER

v.

INDIANA STATE BOARD OF HEALTH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner contends that it is entitled to federal reimbursement for the capital costs of a proposed hospital because a state agency did not act on petitioner's application within sixty days, notwithstanding that the agency was then under a state court injunction prohibiting it from acting on the application.

1. Under Title XVIII of the Social Security Act, popularly known as the Medicare Act, 79 Stat. 291, as amended, 42 U.S.C. 1395 *et seq.*, the federal gov-

ernment reimburses providers of services for "all reasonable costs" actually incurred in connection with furnishing hospital services to the aged. Similarly, under Title XIX of the Social Security Act, popularly known as the Medicaid Act, 79 Stat. 343, as amended, 42 U.S.C. 1396 *et seq.*, Congress established a federal-state program to provide reimbursement for the cost of providing "necessary medical services" to the poor. Each of these programs includes as reimbursable items the cost of depreciation, debt service, and other capital-related costs.

In 1972, Congress amended the Social Security Act to insure that reimbursement would, under Medicare and Medicaid, not be made for any unnecessary capital expenditure. 42 U.S.C. (Supp. V) 1320a-1. That statute authorizes the Secretary of Health, Education, and Welfare to enter into agreements providing for the appointment of a state agency as a "designated planning agency" with responsibility for reviewing proposed capital expenditures and recommending whether they should be approved. The statute further provides that the Secretary shall not include capital costs in determining federal payments if he determines, *inter alia*, that the designated planning agency had, "within a reasonable period after receiving * * * notice [of a proposed capital expenditure]", notified the person proposing the expenditure that it did not satisfy the agency's standards or plans. 42 U.S.C. (Supp. V) 1320a-1(d)(1)(B)(i). Pursuant to the statute the Secretary promulgated regulations establishing the time within which the planning agency

must act upon a notice of a proposed capital expenditure—in cases such as this, within 60 days from receiving the notice—and providing that an agency's failure to act within the designated period constitutes approval of the application. 42 C.F.R. 100.106. See Pet. App. 8, n. 7; 20, n. 11; 30-31.

2. In 1973 respondent Indiana State Board of Health, the designated planning agency in Indiana, determined that additional hospital beds were needed in the Fort Wayne area (Pet. App. 5). Responding to that determination, Community Hospital of Fort Wayne submitted a proposal to the agency to construct a new hospital. The Board rejected the proposal on July 5, 1974, and, after exhausting administrative review, Community Hospital brought suit in state court for judicial review. Meanwhile, petitioner had submitted its proposal for a hospital to the agency. On December 9, 1974, 45 days after petitioner's proposal had been filed, the state court temporarily enjoined the Board from acting on any proposal for health facilities in the area during the pendency of the suit; on December 31, 1974, the court issued a preliminary injunction to the same effect (Pet. App. 5, 6).

Three other hospitals in the area, but not petitioner, intervened in the state court action. On May 27, 1975, the state court dismissed Community Hospital's suit on the ground, *inter alia*, that it lacked jurisdiction to review the action of the Board, but the court enjoined the Board from acting on any proposals for health facilities in the Fort Wayne area

until the three intervening hospitals had an opportunity to submit their own proposals for meeting the need for additional hospital beds. Those hospitals submitted their proposals on June 30, 1975, and the Board disapproved petitioner's proposal on July 9, 1975 (Pet. App. 6).

Petitioner then brought suit in the United States District Court for the Northern District of Indiana, contending, *inter alia*, that the state court injunction had not suspended the running of time under the Secretary's regulations, and therefore that since petitioner's application had not been acted upon within 60 days of its submission, it must be deemed approved. The district court, in a thorough opinion (Pet. App. 1-23), rejected this and all other contentions raised by petitioner, and the court of appeals affirmed (Pet. App. 26-29).

3. The courts below correctly rejected petitioner's contention that its application must be deemed to have been approved. The issue in this case is not, as petitioner contends (Pet. 7-20), whether state courts may, under the Supremacy Clause, enjoin the processing of applications by a federal agency. Rather the issue is whether the 60-day time period set forth in the regulations was tolled by injunctions prohibiting the state agency from acting on petitioner's application. The injunctions plainly had that effect. Indeed, if the regulations were to be given the mechanical reading for which petitioner contends, there would be a substantial question whether they would be consistent with the statutory requirement

that the state planning agency have a "reasonable period" within which to consider proposals. 42 U.S.C. (Supp. V) 1320a-1(d)(1).

Here, a state court, in reviewing the denial of an application of a competing proponent of facilities, temporarily enjoined the state planning agency from acting on other applications for the same facilities until all applications could be considered together. Even if, as petitioner suggests (Pet. 14-15), the state court was without jurisdiction to issue the injunctions, the planning agency appropriately complied with the orders; it had no obligation to violate the injunctions on the questionable assumption that the court was without jurisdiction.[1] Moreover, as the district court stated (Pet. App. 19), in view of the statute's principal purpose to prevent unnecessary capital expenditures, "it would be unreasonable to

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[1] We submit that the state court had jurisdiction to issue the injunctions preventing the Board from acting on petitioner's application. The state court ultimately concluded on May 27, 1975, that it did not have jurisdiction under the Indiana Administrative Adjudication Act to review the decisions of the Board with respect to federal Medicaid and Medicare matters. But the state court unquestionably had both jurisdiction to enjoin temporarily the processing of applications by the state agency pending determination of the jurisdictional issue (*United States* v. *United Mine Workers of America*, 330 U.S. 258, 290-292) and general equity jurisdiction thereafter to ensure that parties to its proceeding were not prejudiced before the State agency by the very pendency of the judicial proceeding. Accordingly, the Board was bound to comply with the terms of the injunctions. *Maness* v. *Myers*, 419 U.S. 449, 458; *Walker* v. *City of Birmingham*, 388 U.S. 307.

require the designated planning agency to process competing applications at a time when pending litigation might establish a prior entitlement in a previously unsuccessful applicant." In these circumstances, the Secretary reasonably concluded that the injunctions served to suspend the time period set forth in his regulations.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

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